Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1446

HENRY LEE ROGERS, LEE CHESTER SMITH,
and N.A. THOMPSON,

Petitioners,

—v.—

INTERNATIONAL PAPER COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, And Its LOCAL 2033; UNITED PAPERWORKERS INTERNATIONAL UNION AFL-CIO, And Its LOCALS 731, 735, 833 and 898,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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HENRY LEE ROGERS, LEE CHESTER SMITH,
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INTERNATIONAL PAPER COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, And Its LOCAL 2033; UNITED PAPERWORKERS INTERNATIONAL UNION AFL-CIO, And Its LOCALS 731, 735, 833 and 898,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 7, 1975 and modified February 14, 1975.

Opinions Below

The decision of the United States Court of Appeals for the Eighth Circuit and the order denying the petition for rehearing of the respondent International Paper Company, reported at 510 F.2d 1340, are reprinted *infra* at 35a and

68a, respectively.[1] The order denying the petition for rehearing of the petitioners is printed *infra* at 71a. The memorandum opinion of the United States District Court for the Eastern District of Arkansas has not been reported, but is printed *infra* at 1a.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on January 7, 1975. Separate petitions for rehearing timely filed by respondent International Paper Company and by petitioners were denied, respectively, on February 14 and 18, 1975. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the future elimination of racial discrimination in opportunities for promotion and transfer, pursuant to court order under Title VII of the Civil Rights Act of 1964, obviates the need for back pay to redress economic loss suffered in the past by victims of such discrimination.

2. Whether the decision of the court below, in denying back pay to victims of racial discrimination in employment, is consistent with the disposition that will be made by this Court of the questions concerning the standards governing the award of back pay under Title VII of the Civil Rights Act of 1964 raised in *Albemarle Paper Company* v. *Moody*, No. 74-389, and *Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO* v. *Moody*, No. 74-428, argued April 14, 1975 and presently pending before this Court.

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[1] This form of citation is to pages of the Appendix.

Statutory Provisions Involved

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, provide:

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), 42 U.S.C. § 2000e-2(c):

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit

such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

Statement of the Case

The petitioners, Henry Lee Rogers, Lee Chester Smith and N.A. Thompson, black employees of respondent International Paper Company, brought this suit as a class action on May 17, 1971, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; 42 U.S.C. § 1981;

and 29 U.S.C. § 151 *et seq.* (prescribing a duty of fair representation). Federal jurisdiction was predicated upon 28 U.S.C. §§ 1343(4), 2201 and 2202. The complaint alleged racial discrimination in employment by respondent International Paper Company (hereinafter "the Company") with respect to hiring, compensation, promotion and other terms and conditions of employment at its Pine Bluff, Arkansas mill, and the maintenance of discriminatory employment practices by the respondent unions.[2] Following a trial in February and March 1972, the District Court found that all of the respondents "openly discriminated on the basis of race in the hiring and assignment of employees" from the time the Pine Bluff Mill opened in 1958,[3] and that this discrimination and the effects thereof, as perpetuated by a variety of practices including a "job seniority" system,[4] continued unabated until August

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[2] International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO; Locals 898 and 946 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers; United Papermakers and Paperworkers, AFL-CIO; Locals 731, 735 and 833, United Papermakers and Paperworkers, Pine Bluff, Arkansas; International Brotherhood of Electrical Workers, AFL-CIO; and Local 2033, International Brotherhood of Electrical Workers. Local 946 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, the local to which all black employees belonged, was dissolved in 1968. After trial the International Brotherhood of Pulp, Sulphite and Paper Mill Workers and United Papermakers and Paperworkers merged, becoming the United Paperworkers International Union, AFL-CIO. Their respective local union numbers remained the same after the merger.

[3] The Company reserved certain jobs for whites and other jobs, the lower-paying, more physically demanding ones, for blacks (6a). No blacks occupied a previously all-white job until 1967; no white was assigned to a black job until 1968 (11a).

[4] See, e.g., *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *United States* v. *N.L. Industries*, 479 F.2d 354 (8th Cir. 1973).

7, 1968, but that on that date such conduct and the effect thereof ceased. In particular, the court held (a) that the seniority system as modified in 1968 was adequate to protect the rights of black employees despite the admitted continuation of shortcomings requiring further corrective action in 1972, after this action had been instituted (24a, 25a); (b) that the Company's testing program was not discriminatory and was job-related (20a, 27a); and (c) that there was no evidence of discrimination in maintenance, i.e., craft, jobs (18a).[5] The opinion made no mention of the exclusion of blacks from supervisory jobs. The court concluded that injunctive relief was unnecessary to assure compliance with Title VII (31a) but retained jurisdiction and directed the Company to make periodic reports to the court "of its employment activities" (33a). Stating that "this litigation has, without doubt, acted as a catalyst which partially prompted the defendants to take some action implementing its [sic] own fair employment policies and seeking compliance with the requirements of Title VII", the court awarded the petitioners costs including counsel fees (34a).

Although petitioners had shown that the class suffered severe economic loss as a result of respondents' discriminatory practices,[6] the court specifically denied back

[5] The record shows that at the time of trial there were 253 white and only two blacks in true craft jobs. Both blacks were apprentices; there had never been a black journeyman.

[6] The District Court found that Black employees had been assigned lower-paying jobs than white employees (6a). The record shows 1) that in nearly every department, almost all blacks earned less than most whites, 2) that in every department the average hourly rate of whites was higher than the average hourly rate of blacks, 3) that not one of 112 black hourly-rated employees held a job with an hourly rate in excess of $4.31, while 404 whites out of 1081 (37%) held such jobs, and 4) that the average hourly rate at the time of trial of whites hired in any given year was higher than the average hourly rate of blacks hired in the same year.

pay, relying on *United States* v. *N.L. Industries*, 479 F.2d 354 (8th Cir. 1973) (33a-34a).

Petitioners appealed to the United States Court of Appeals for the Eighth Circuit,[7] which reversed in part, vacated in part, and remanded (35a-67a). It held as follows:

(a) *Supervisory Personnel:* Statistical evidence that among 160 supervisory employees there was only one black, an accountant hired in 1969, coupled with the existence of a selection system that lends itself to racial abuse, was sufficient to make a prima facie showing of racial discrimination, which had not been rebutted by the Company. Since the District Court in defining the class had excluded supervisory employees (22a), this aspect of the case was remanded for further hearings and a determination as to whether there was racial discrimination in this category (38a-46a).

(b) *Maintenance Craft Jobs:* The Company's use of a battery of standardized tests as selection devices for maintenance craft jobs had a disproportionately adverse effect on black applicants and the Company's attempt to prove the tests job-related by means of validation studies was unsatisfactory in many respects.[8] The District Court was instructed, on remand, to direct the Company to conduct new validation studies, and if it finds the tests to have resulted in a racially discriminatory hiring or transfer policy to devise remedies to give hiring or transfer preference, as vacancies become available, to those who had suffered therefrom (48a-55a).

[7] Petitioners raised the District Court's denial of back pay as a separate point of error in their appeal to the Court of Appeals.

[8] Cf. *Albemarle Paper Company* v. *Moody*, No. 74-389.

The court also found no business necessity for the Company's present entry level age limitation, together with a disparate effect on black applicants because of prior discrimination, and ordered temporary raising of the maximum age for entry into apprenticeship programs until the District Court determines that there is sufficient minority representation in the Company's maintenance craft jobs (55a-56a).

(c) *Production Jobs:* The court held that, in light of the respondents' past history of maintaining racially segregated lines of progression, with those open to blacks the lowest paying and least desirable, the continuance of facially neutral seniority, promotion and transfer policies continued the effects of past discrimination into the present. Despite the 1968 changes, which had been deemed sufficiently curative by the District Court, as well as further revisions made in 1972, after the trial but before the District Court decision in the instant case, the Court of Appeals noted that "no significant movement to rightful places has been realized by former discriminatees . . . . ," concluded "that the present transfer, promotion and seniority practices in the production department at Pine Bluff continue to perpetuate the effects of past discrimination," and held that the district court had been in error in denying injunctive relief (56a-65a).

Accordingly, the Court of Appeals directed that on remand:

(a) The District Court should ensure full wage protection to affected class members who exercise transfer opportunities by raising "red circle" [9] ceilings to realistic

[9] "Red Circling" is the name commonly given to the practice of continuing the wage rates of employees who transfer into other departments or lines of progression at levels paying lower rates, so that the temporary drop in wages will not discourage such transfers. Apart from its use in other labor-management situations, it has been frequently ordered as an essential ingredient in the correction of discriminatory seniority and transfer practices. See, e.g., *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 661 (2nd Cir. 1971); *Robinson* v. *Lorillard Corp.*, 319 F. Supp. 835, 842 (M. D. N. C. 1970), *affirmed*, 444 F.2d 791, 796 (4th Cir. 1971).

levels (in accordance with a formula set forth by the Court of Appeals) and extending coverage to class members previously excluded.

(b) The District Court should require the Company to demonstrate which jobs provide essential training for progression and which could be skipped upon entry and promotion, so that advancement of victims of previous discrimination would not be held back by barriers unsupported by business necessity.

(c) For the same reason, the District Court should review the length of the residency requirements in a given job which employees have to satisfy before being eligible for advancement to the next higher level, to determine whether they are the least restrictive means to accomplish their purpose, and to consider whether functionally equivalent experience in former lines of progression may satisfy those requirements;

(d) The District Court should review the Company's practices in advancing victims of racial discrimination to their rightful place as expeditiously as possible and to the same extent as it now accords a rightful place to returning servicemen; and

(e) This relief should be made available to all affected class members regardless of whether they had declined transfer offers in the past (65a-66a).

The court then stated: *"If these conditions are fully implemented, the need for a back pay award will be obviated."* (66a) (Emphasis supplied).

Both the petitioners and the Company asked the Court of Appeals for rehearing, the petitioners also suggesting a rehearing en banc. Petitioners specifically sought on rehearing an award of back pay. In response to the Company's petition the court made minor changes in the text of its opinion, and it denied both petitions for rehearing (68a-71a).

Reasons for Granting the Writ

I

The Case Presents an Important Question of Federal Law Which Should Be Settled by This Court.

Petitioners and their class suffered loss of income as a result of employment practices which the Court of Appeals found to be discriminatory. They will continue to lose earnings until all present discriminatory practices and effects of past discrimination have been eradicated. While the Court of Appeals directed the removal of a number of racially discriminatory barriers to promotion and transfer, it denied compensation for the losses they caused in the past. In holding that the opening up of such opportunities, in time to come, satisfies the responsibility of the judiciary to effectuate the purposes of Title VII, the court has ruled in effect that compensation for monetary loss suffered because of past discrimination may be traded away for injunctive relief forbidding continued discrimination in the future.

The rationale of the Court of Appeals, that future injunctive relief might "obviate" the "need" for back pay, is self-contradictory and untenable. Injunctive relief is by definition prospective. No amount of prospective injunctive relief can provide class members with compensation

for monetary loss suffered in the past (and until the remedial decree issues). For those older workers who will be unable to take advantage of the opportunities for advancement which injunctive relief should provide, to deny back pay is to deny the only meaningful relief afforded by Title VII for a lifetime of discrimination.

In Title VII cases as in other civil rights areas, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). Back pay, to redress economic harm caused by unlawful employment discrimination, has heretofore been uniformly regarded as an essential component of the remedies available in order to make the victims whole. In reviewing the judicial construction of Title VII and recommending the adoption of the Equal Opportunity Act of 1972, P. L. 92-261, 86 Stat. 103,[10] the Conference Committee, in its section-by-section analysis, stressed the importance of full remedial relief:

> The provisions of this subsection are intended to give the courts *wide discretion exercising their equitable powers to fashion the most complete relief possible*. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of *the Act is intended to make the victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved

[10] While the 1972 law amended Title VII of the Civil Rights Act of 1964 in a number of respects, none of the changes bears upon the back pay issue as it arises in the instant case, and if the holding below is allowed to stand it would be equally applicable to the amended statute.

by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination (emphasis supplied). 118 Cong. Rec. 7168 (1972); see also 118 Cong. Rec. 4942 (1972) (Section-by-Section Analysis introduced into Record by Sen. Williams).

The decision of the court below, so long as it stands unreversed, will constitute a serious threat to the effectuation of a Congressional policy of utmost national importance.

II

The Decision Below Is in Conflict With the Decisions of Other Courts of Appeals on the Same Matter.

The courts of appeals of five other circuits have consistently awarded both injunctive relief and back pay in cases strikingly similar to the instant case. Back pay was awarded, along with injunctions against continued use of discriminatory seniority systems and invalid tests, in *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973),[11] cert. granted, —— U.S. ——, 95 S.Ct. 654 (Dec. 16, 1974): *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973),[12] *Johnson* v. *Goodyear Tire & Rubber Co.*,

[11] ". . . a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust." 474 F.2d at 142.

[12] "Given this Court's holding that '[a]n inextricable part of the restoration to prior [or lawful] status is the payment of back wages . . .' it becomes apparent that this form of relief may not properly be regarded as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief. . . ." 474 F.2d at 921.

491 F.2d 1364 (5th Cir. 1974),[13] and *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). Back pay was combined with injunctions against invalid seniority practices in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); and *Head* v. *Timken Roller Bearing Co.*, 484 F.2d 870 (6th Cir. 1973). Back pay, and an injunction against an unwarranted weight lifting requirement that discriminated against women and an improper seniority program, were combined in *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), 489 F.2d 896 (7th Cir. 1973). And in *Rosen* v. *Public Service Gas & Electric Co.*, 477 F.2d 90 (3d Cir. 1973), back pay accompanied an injunction against continuation of a discriminatory pension system.

All of these cases conflict with the holding of the court below that comprehensive injunctive relief obviates the necessity of back pay.[14]

[13] "Where employment discrimination has been clearly demonstrated . . . victims of that discrimination must be compensated if financial loss can be established. . . . To implement the purposes behind Title VII, a court should give 'a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities.'" (footnote omitted). 491 F.2d at 1375.

[14] There is an additional conflict in the circuits if the denial of back pay for the reason stated by the Court of Appeals was intended to apply only to blacks excluded from production jobs. (It may be noted that the sentence stating that "the need for a back pay award will be obviated" appears at the close of the section of the opinion relating to production jobs (56a-66a). If so, the failure of the court to reverse the District Court's blanket refusal to grant back pay may be deemed an affirmance of that aspect of the District Court's decision to the extent that it applied to other categories of employment, i.e., supervisory and maintenance jobs.

That refusal, in turn, was based on an earlier decision of the Court of Appeals for the Eighth Circuit, *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 380 (1973), in which back pay was withheld because "[i]n this Circuit the law in regard to back pay has not been adequately defined to provide employers and unions

III

Efficient Judicial Administration Would Be Served if This Court Will Grant Certiorari, Vacate the Judgment Below, and Remand for Further Consideration in the Light of This Court's Decision in *Albemarle Paper Company* v. *Moody* and *Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO* v. *Moody*.

The two petitions for certiorari in *Moody* referred to above were granted, and the cases were consolidated, briefed and argued, and are now awaiting decision. (Docket Nos. 74-389 and 74-428.) The question of the standards that should govern the awarding of back pay was one of the two issues raised in the first of these petitions and the only issue raised in the second. If, as appears probable, this Court decides that issue, almost inevitably its decision and opinion will at least cast some light on the propriety of the denial of back pay in the instant case and may well be dispositive of it. It would be wasteful of judicial time and effort and of the labors of counsel to deny certiorari and thus allow the case to be remanded to the district court for further proceedings under instructions that take no account of the rulings to be made by this Court on the very subject in dispute.

with notice that they will be liable for a discriminatee's economic losses. . . ." Such a limitation on back pay has been expressly rejected by other circuits: "[T]he unsettled nature of the law applicable to a particular employment practice does not constitute a legally cognizable defense to a claim for back pay in a Title VII suit." *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974) Accord: *Robinson* v. *Lorillard* Corp., 444 F.2d 791, 804 (4th Cir. 1971). It is also inconsistent with each of the cases cited in the text above which was the first in its respective circuit to hold the practices complained of illegal, and with this Court's rejection of "good intent or absence of discriminatory intent" as defenses, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971).

We therefore respectfully urge that this Court grant the writ, and that if the Court decides the merits of the aforementioned *Moody* cases in a manner consistent with the position of petitioners herein, it summarily vacate the judgment below insofar as it fails to grant back pay and remand for further consideration in the light of that decision.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

Opinion of District Court

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

No. PB 71-C-47

HENRY LEE ROGERS, LEE CHESTER SMITH, and N. A. THOMPSON, Individually and on behalf of other persons similarly situated,

Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY, PINE BLUFF, ARKANSAS,

and

INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS, AFL-CIO; LOCALS 898 and 946 OF THE INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; LOCALS 731, 735 and 833 UNITED PAPERMAKERS AND PAPERWORKERS, PINE BLUFF, ARKANSAS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Defendants.

MEMORANDUM OPINION

The plaintiffs filed this class action proceeding pursuant to 28 U.S.C. § 1343(4); 42 U.S.C. § 2000e-5(e) and (f); and 28 U.S.C. §§2201 and 2202. The named plaintiffs are

black employees of the defendant, International Paper Company (hereinafter called "I.P."), and bring this action on behalf of themselves and other blacks similarly situated, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

In addition, this is a suit in equity under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. The plaintiffs invoke the jurisdiction of this Court to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e, et seq., providing for injunctive and other relief against racial discrimination in employment, (b) 42 U.S.C. § 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States, and (c) the duty of fair representation, 29 U.S.C. §§ 151, et seq.

The class which the plaintiffs represent is composed of black persons employed or who might seek employment by I.P. at its manufacturing facilities in Pine Bluff, Arkansas, and who have been and continue to be or might be adversely affected by the practices complained of. The plaintiffs also bring this action on behalf of the black members of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, Locals 898 and 946, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, United Papermakers and Paperworkers, AFL-CIO, and Locals 731, 735, and 833, United Papermakers and Paperworkers, Pine Bluff, Arkansas and International Brotherhood of Electrical Workers, AFL-CIO, and Local 2033, International Brotherhood of Electrical Workers, who have been and continue to be or might be adversely affected by the practices complained of.

The plaintiffs allege that there are common questions of law and fact affecting the rights of members of their class who are and continue to be limited, classified, discriminated

against and refused employment and which deprive and tend to deprive them of equal employment opportunities and, otherwise adversely affect their status as employees because of their race and color. These persons are so numerous that joinder of all members is impracticable. A common relief is sought, and the interests of the class are adequately represented by the plaintiffs.

The nature of the claim is for declaratory relief, with permanent injunction requested, restraining all of the defendants from continuing policies and practices discriminating against the plaintiffs and other blacks with respect to hiring, compensation, terms and conditions of employment; limiting, segregating and classifying employees in ways that deny the members of the class their equal employment and, otherwise adversely affecting their status as employees or prospective employees; refusing to promote because of race; demoting because of race; merging formerly segregated unions without provision for protection of the formerly all black unions; and by excluding plaintiffs and members of their class from union membership because of their race.

The named plaintiffs are black citizens of the State of Arkansas, and employees of I.P., located at Pine Bluff, Arkansas, who have filed charges of discrimination with the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964 against the defendant Company and unions and who have received notice of their right to bring this action.

The defendant, I.P., Pine Bluff, Arkansas, is a branch of a private corporation doing business in the State of Arkansas and the City of Pine Bluff. The Pine Bluff facility is an employer within the meaning of 42 U.S.C. § 2000e (b) in that the Company is engaged in an industry affecting commerce and employs at least 25 persons.

The defendants organized as international unions are labor organizations which exist in whole or in part for the purpose of dealing with International Paper Company concerning grievances, labor disputes, wages, rates of pay, hours and other terms and conditions of employment of employees of the Company at its facilities in and around the City of Pine Bluff in the State of Arkansas. The defendant Locals are agents and affiliates of international unions and exist in whole or in part for the same purposes as the international union.

On June 29, 1971, I.P. filed a Motion to Dismiss or, alternatively, a Motion to Stay the Proceeding pending further conciliation efforts by the Equal Employment Opportunity Commission (EEOC). Although the Motion to Dismiss was predicated upon several grounds, it was in essence, a challenge to the procedural steps taken by plaintiffs as a proper basis for the filing of the Complaint in this case. The Pulp and Sulphite Workers and the Papermakers likewise filed a Motion to Dismiss the Complaint on the ground that the Court lacked jurisdiction over the parties. Both of these motions were denied by the Court in its Order of October 22, 1971.

The defendant, I.P., and defendant unions filed answers, respectively, consisting of general denials of the material allegations of the plaintiffs' complaint with regard to discrimination in employment and in union activities but, also, raised the specific questions of whether or not plaintiffs have exhausted their remedies prior to invoking the jurisdiction of this Court; whether or not they have standing to represent the class referred to in the Complaint; and whether or not both I.P. and defendant unions have eliminated remaining vestiges of alleged prior discrimination

by the adoption and implementation of a document known as the "Jackson Memorandum of Understanding" (hereinafter Jackson Memorandum).

The trial of the case was scheduled in November, 1971, but was continued to permit the parties to engage in extensive pre-trial discovery in the form of depositions and interrogatories. Subsequently, the Court scheduled the case for trial commencing the week of February 7, 1972. Just prior to the trial of the case, the plaintiffs filed a Motion to sever all questions pertaining to back pay and requested that a master be appointed by the Court to take evidence and present findings of fact with respect to that issue. The defendants, in responding to the Motion, strongly contended that the plaintiffs were not entitled to money damages or back pay and affirmatively pleaded the statute of limitations and the equitable doctrine of laches as a complete bar to any back pay claim. The Court, in granting the Motion to sever, entered an Order on November 28, 1972, but did not grant the request for a master to be appointed regarding the back pay issue.

The trial of the case consumed the weeks of February 7, and March 20, 1972. The Court heard extensive oral evidence and received innumerable exhibits. Plaintiffs filed a Motion to Dismiss Pulp and Sulphite Workers and its Locals 898 and 946, and Papermakers and its Locals 731, 735, and 833, based upon an agreement attached to the Motion to Dismiss. The basis of the agreement was that all issues raised in the pleadings with respect to the parties thereto had been settled and that the action should, therefore, be dismissed with respect to these defendants. Defendants I.P. and IBEW opposed the Motion and a formal Order was entered by the Court on November 28, 1972, denying the Motion.

The Pine Bluff Paper Mill is a substantial operation primarily engaged in the treatment of wood and, through extensive process, converts it into paper. It is one of a number of such facilities maintained and operated by the defendant I.P.

The Pine Bluff Paper Mill was constructed and began production in August, 1958. Many of the employees, and especially skilled and supervisory employees were transferred from other facilities operated by the Company. The remainder of the jobs, including some highly-skilled positions, were filled by employees newly hired by the Company at that time.

Jefferson County, Arkansas, in which the paper mill is located, has at all times relevant to this litigation had a substantial black population. It is undisputed that the initial staffing of the paper mill was made along strict racial lines as a matter of Company policy, with some job categories reserved solely for white employees and some for blacks.

The job categories assigned to black employees were generally lower-paying, more physically demanding, and, generally less desirable than those assigned to whites. Employee facilities at the paper mill, such as lunchrooms and other service facilities, were operated on a strictly segregated basis.

The paper mill and job assignments for its operation are divided into several departments, each consisting of various jobs, having a close functional relationship with each other and usually operating with a distinct geographic area.

Most job assignments in the paper mill were organized into lines of progression (hereinafter sometimes referred to as "LOP's"), under which an employee assigned to a particular LOP would progress from one job assignment

to another along the LOP in a predetermined sequence. LOP's were organized in accordance with a number of criteria including, sometimes in combination and sometimes singly, location, department, function, relationship of skills, wages and the traditions of the Southern paper mill industry.

There were a number of jobs in the paper mill which were not assigned to any line of progression. Among these were the laborers jobs, some of which were assigned to work with each of various LOP's or in various departments, and managerial and supervisory personnel. As an example, the woodyard department consisted from employees from two LOP's, the woodyard LOP and the equipment LOP, together with a laborer complement. The woodyard LOP and the woodyard labor pool initially were all black, while the equipment LOP was all white.

Jobs in the woodyard LOP, the equipment LOP, and the woodyard labor pool, were and are very closely related functionally, and employees assigned to all those jobs work in conjunction with each other on a daily basis. The only distinction between the two LOP's located within the woodyard, other than the racial one indicated above, was that job categories in the equipment LOP received higher wages than those in the woodyard LOP.

The pulp mill LOP was staffed solely by white employees. A small number of job assignments functionally related exclusively to those in the pulp mill LOP were filled solely by blacks, such as the "lime wheeler". These black-staffed jobs were not included in the pulp mill LOP.

The beater room LOP was staffed solely by white employees.

The paper machine LOP, the most highly paid LOP in the paper mill, was staffed solely by whites. A group of

black laborers worked with the members of the paper machine LOP but were not assigned to it.

The LOP of the polyethylene extruder, added sometime after the opening of the paper mill in 1958, was staffed solely by whites.

This method of assignment and job classification prevailed throughout the facility wherein the whites were assigned to specific jobs and other specific assignments to blacks. The guard force consisted of white employees as did the managerial and supervisory employees. Neither of these were organized into LOP's, although the testimony revealed that there were recurring patterns for promotion from one job assignment to another as is common practice in managerial structures.

The International Brotherhood of Pulp, Sulphite, and Paper Mill Workers represented the employees in the woodyard and pulp mill. Its Local 946 represented black employees, and its Local 898 represented whites in the pulp mill and in the laboratory LOP. In order to bring the continued operation of their local unions in compliance with the law, the defendant, International Union of Pulp, Sulphite, and Paper Mill Workers ordered a merger of the two locals. They were merged into one local and continues as Local 898. Local 946 was dissolved.

The defendant, International Brotherhood of United Papermakers and Paperworkers represented their members employed by I.P. through their Local 731, 735, and 833. Black members of the union suffered similar discrimination in the operations of their labor organization.

The International Brotherhood of Electrical Workers and its Local 2033 represented the employees in the electrical, instrument and power plant LOP's. The guards, and office and clerical employees, were not represented by

any of the unions as parties to this litigation. The managerial and supervisory employees were not, and are not, represented by any labor organization.

The defendant, I.P., has, at all times pertinent to this litigation, had exclusive control over the hiring for all jobs, whether represented or not represented. The Company retains for itself the right to establish the minimum requirements and standards for all applicants for employment as well as the right to make decisions regarding placement of employees in labor pools or positions within the plant. Once hired, an employee's movements from one job assignment to another, among those jobs whose occupants are represented by any of the labor organizations who are parties defendant, are and have been controlled by provisions of a series of collective bargaining agreements entered into by the defendants. Under the collective bargaining agreements, each employee accrues three (3) types of seniority, to-wit: company seniority, the length of time he has been continuously employed by I.P.; department seniority, the length of time he has been permanently and continuously assigned to a particular LOP; and job seniority, the time he has spent permanently and continuously assigned to a given job slot. Periods during which an employee may have been laid off are included in figuring company seniority, but not department or job seniority.

In order to enter a LOP, whether from another LOP or from a job outside any LOP, employees have historically competed on the basis of company seniority. If there was a permanent vacancy in a LOP, the employee with the greatest company seniority, who indicated his desire for it, would receive the assignment, if he was of the race for which the LOP was reserved. After the plant was initially

staffed, an employee newly assigned to a LOP entered it by being assigned to its lowest-paying job.

Once in a LOP, employees competed for progression from one permanent job assignment to the next highest-paying one in the LOP on the basis of their job seniority. The employee with the greatest tenure of permanent assignment to the job slot immediately below the vacancy would receive the assignment. If job seniority were equal, greater departmental seniority would control; if both were equal, greater company seniority would control. This resulted from an entry level job of lower pay to an ascending scale of pay.

From 1958 until 1962, black employees of the defendant, I.P., were not permitted entry level jobs in any LOP except the woodyard. As late as 1971, the woodyard was the next to lowest pay when measured by LOP hourly wage.

In 1962 Executive Order 10925 was promulgated which, in effect, prohibited government contractors from discriminating against any employee because of race, color, creed or national origin. The International Paper Company became subject to the Executive Order as a substantial contractor. I.P. responded promptly to the requirements of the Executive Order and announced that henceforth there would be no segregation of its facilities and that all LOP's were open to all employees without regard to race, color, or national origin. It was of such import to I.P. that officials from the division level toured each of the mills in its Southern Kraft Division, including Pine Bluff, and met with local mill management and employee representatives, including black union leaders, as a means for announcing the new policy required by Executive Order 10925. The Company began immediately the desegregation of its facil-

ities which has long since been accomplished and is not an issue in this case. In addition, the Company further announced a policy of recruitment of individuals without regard to race or color, and a promotion policy which eliminated race as a factor.

With these announced changes in policy, black employees, who demonstrated potential ability to perform jobs in a line of progression under I.P.'s testing program, and who so desired, could transfer under the Labor Agreement with the unions to former predominantly white jobs. There was some movement of incumbent blacks into some of the predominantly white positions.

The transition was slow. Desegregation of Company facilities was not completed until 1966. The first black employee who was permanently assigned to a previously all-white job did not occur until 1967. The first white employee assigned to a formerly all-black job was made on a permanent basis in 1968.

Because of the operation of the contract's seniority provisions, any black employee who entered a previously all-white LOP as late as 1967 would remain behind the white employees who entered the line of progression before him, notwithstanding the fact that the white employee may have been employed several years after the black employee.

As a result of the continuing effect of past discrimination, and a 1968 District Court decision, in U.S. v. Local 189, United Papermakers and Paperworkers, 282 F. Supp. 39 (E.D. La. March 1968), the Office of Federal Contract Compliance (OFCC) undertook the acceptance of an agreement, by I.P. and the unions, to modify the effects of the contract seniority provisions. Discussions took place between OFCC and the Company toward providing incumbent blacks with additional opportunities for advancement

in employment throughout the Southern Kraft Division of I.P.

A special conference was called in Jackson, Mississippi, in June, 1968. Top management of the Company and labor organizations, which included representatives of management and labor for each of the mills in the Southern Kraft Division of I.P., participated in the conference; since the conference was instigated by OFCC, government representatives also participated in the discussions. Representatives of black employees were in attendance at the conference as delegates and participated in the discussions. There was some testimony that the blacks were present as "observers" and not as official representatives of the black employees.

During the course of the conference, the Office of Federal Contract Compliance presented twelve points to the Company and unions as a basis for their discussion of necessary and appropriate changes which should be made to their existing Labor Agreements. The negotiations produced an agreement called the "Memorandum of Understanding" or "Jackson Memorandum". Pursuant to the "Jackson Memorandum", the parties agreed to revise the basic Labor Agreements and employment practices, alleviating some of the continuing effects of the defendants' past discriminatory practices. The Jackson Memorandum was circulated at the various mills of the Southern Kraft Division, including Pine Bluff, and was ratified by the local unions at all mills.

The OFCC adopted the position that the Jackson Memorandum was sufficient for compliance with Executive Order 11246[1] without the need for further collective bargaining

[1] Executive Order 11246 superseded Executive Order 10925.

beyond the agreed changes included in the Memorandum.

The primary impact of the Jackson Memorandum was to identify an "affected class" of employees (hereinafter referred to as "AC"), and to displace the old job seniority system with a mill seniority system whereby members of AC compete with other employees for promotion, transfer, and other personnel actions on the basis of mill seniority. This took the place of the old policy of competing on the basis of job or departmental seniority.

The Jackson Memorandum also contained a provision to the effect that the Company and the unions, at each plant, would conduct further negotiations toward an agreement on restructuring of the LOP's, so that the formerly all-black jobs were integrated into longer LOP's also containing traditionally white jobs. However, if competition between an affected class member and a non-affected class member does not exist, the Jackson Memorandum provides that the traditionally contract seniority applies.

Members of the affected class are identified, or defined, as those black employees hired prior to September 1, 1962, or employed thereafter, but prior to the date of the Jackson Memorandum, and initially placed in a job or line of progression which was formerly a predominantly black job or line.

The Jackson Memorandum contains a further provision that all current employees are eligible for transfers or advancement into a line of progression if they possess qualifications equal to the minimally qualified employee currently working in that line. Testing was deleted as a requirement for incumbent employees to be eligible for transfer to or entry into any production line of progression. It further provides for affected class transfer under

a "red-circle" rate which protects against wage loss in the event the desired transfer is to a lower paying job.

Subsequently, the OFCC submitted a letter of explanation of the Jackson Memorandum written by the acting Director and became known as the "McCreedy letter". It was made clear that no skipping of job assignments within a LOP or entry to a LOP at other than the lowest-paying job was to be permitted. Designation of a job opening as a "temporary" or "permanent" one had always and was still made solely by the Company. Assignments upwards along a LOP designated as "temporary" had often lasted long periods of time, and, in some cases, even longer than a year.

As a result of these practices, some employees spent large portions of their working time "temporarily" assigned to jobs one or more steps in a LOP above their "permanent" assignment. The effect was that some spent a lot of their time "temporarily" assigned to higher-level jobs.

The so-called McCreedy letter gave some significance to this distinction between a "permanent" and a "temporary" job assignment. Only an employee "permanently" assigned to a given job slot was eligible for assignment to the next higher slot.

Some of the rights granted to black employees by the Jackson Memorandum depended on some affirmative action on the part of the employee to obtain them. Shortly after the adoption of the Jackson Memorandum, August 7, 1968, the Personnel Department of the Pine Bluff mill of I.P. interviewed, individually, all affected class employees in order to advise them of their rights and, in an attempt to determine from them their interest in transferring from

the line in which they were working, at that time, to another line of progression. As to those which were not in a line of progression, an effort was made by the Personnel Department to determine the lines of progression into which they desired to enter, if any.

Written applications were prepared for AC's who desired to transfer, or to be promoted; these applications were retained in the Personnel Office for reference if vacancies occurred. There were some instances of job refusals by black employees, whereby the employees allegedly indicated their refusal to be assigned to jobs higher in the LOP than their then-current assignment. AC's, who initially said they were not interested in transferring or moving up were, subsequently, contacted again to determine if they desired then to exercise their rights under the Jackson Memorandum.

Subsequently, the Company agreed to post throughout the plant notices for seven days of all permanent vacancies in entry level jobs as well as for temporary vacancies which were expected to last more than thirty days. Copies of these notices were made available to each of the local unions. All employees could apply for any vacancy that was posted. Competition between applicants, e.g., employees who had previously expressed a desire for that line of progression, and employees in the labor pool serving that line of progression was resolved on the basis of mill seniority as provided by the terms of the Jackson Memorandum.

There was substantial statistical data furnished by both parties. The plaintiffs attempted to show a "lock in" effect of prior practices. However, I.P. contends that such result, if any, was from failure of more complete utilization by affected class employees of opportunities afforded under

the remedial relief measures agreed to by the defendants, I.P. and unions.

In any event, the Court is impressed with the fact that there was statistical data which shows some permanent movement by AC's into formerly predominantly white jobs and, also, movement via posted temporary vacancies, i.e., those expected to last over thirty days. In view of the frequently recurring vacancies, employees classified at one job level often received temporary promotions to the next higher job where they may have an opportunity for an even higher temporary promotion. It is quite clear, however, that there are a great many more temporary vacancies of less than thirty days which AC's fill in accordance with the terms of the Jackson Memorandum. The Court is persuaded and concludes, from all the evidence, that a qualified AC who desires promotion or transfer to better jobs, under the Jackson Memorandum, has had the opportunity to do so provided his mill seniority was greater than others applying for the same vacancy. It is further noted, from the record, that there are those who have not declined promotion who have received one or more promotions.

Numerous exhibits have been received in the record illustrating how effective the Jackson Memorandum has been in precipitating accelerated movement of the affected class. The record discloses that, as a result of the Jackson Memorandum, there has been substantial movement of black employees into the lines of progression. This has not been without some difficulty. However, it has served substantially toward achieving the intended purpose.

Where an affected class member was in competition with a non-affected class member, under the Jackson Memorandum, the AC received the job. There is no substantial evidence to the effect that a qualified senior AC failed to re-

ceive a job sought by him. There are instances wherein claims have been made which raise the question of qualifications or, in some cases, fear as to the ultimate result. Nevertheless, the ultimate result has been that the AC's have either received advancement or transfer on their request under the Jackson Memorandum, or have voluntarily declined transfer and, in some cases, removed themselves from contention in other jobs. The record discloses, and the Court concludes, that the Jackson Memorandum has served as an effectual instrument toward eradication of the effects of past discrimination.

Even though the Court concludes from the evidence in the case that the Jackson Memorandum, as modified by the McCreedy letter, has provided remedial relief against the residual effects of past practices engaged in by the Company and the unions, and that I.P. and the unions have, in good faith, undertaken implementation, it developed that there were yet some steps to be taken toward the elimination of the last vestiges that remained from the effects of past discrimination.

In recognition of the need for further revision of procedures within the various mills of the defendant, International Paper Company, a second Jackson conference was convened in June, 1972, under the auspices of the OFCC. The Southern Kraft Division of the defendant, International Paper Company, and paper production unions, representing the various I.P. mills, negotiated a new Memorandum of Understanding.[2] There were some ten (10) mills, including the Pine Bluff mill, in the Southern Kraft Division of the International Paper Company affected by the revisions to the "Jackson Memorandum". Although the

[2] A revision, supplementing the original Memorandum of Understanding.

plaintiffs claim they were not represented at these negotiations, it is an established fact that members of the black race were in attendance as observers.

The "McCreedy letter" complained of by the plaintiffs had been partially nullified to the effect that temporary service on the jobs began the basis for competition for permanent vacancies. In fact, the 1972 Memorandum eliminated the consequences of the distinction between "temporary" and "permanent" job assignments. Further, the recall provisions of the McCreedy letter were nullified. The parties were authorized, subject to approval of OFCC, to identify jobs which may be skipped or jobs which may be entered at an advanced level in certain lines of progression. The definition of the affected class was enlarged and a new, substantially higher, red-circle rate was adopted.

Pursuant to the revised Jackson Memorandum, an agreement was entered into by the defendants so as to provide seniority protection for a period of six (6) months for an affected class employee who transfers from a line of progression to the Maintenance Department as an apprentice. These additional procedures, included in the revision, were adopted in order that greater equal employment opportunities, as they evolve, would occur and consequently remove, voluntarily, any and all vestige of past discrimination.

The plaintiffs contend that the revised Jackson Memorandum was inadequate as a matter of law because it did not apply to Maintenance Departments. The OFCC had previously determined that there was no evidence of discrimination against blacks in the maintenance crafts. Thus, OFCC did not request any action be taken in the Jackson conference affecting employees in the Maintenance De-

partments. The testimony fails to disclose that there has been overt discrimination in these departments.

The defendant, I.P., initiated certain testing requirements as prerequisites for hiring or promotion. Testing requirements remain as prerequisites for most of the jobs at the paper mill today. The test used in the Production and Maintenance Departments are as follows:

Production

Wonderlic Personnel Test—15
Bennett Test of Mechanical Comprehension
(Form AA)—20
or
Bennett Test of Mechanical Comprehension
(Form BB)—12

Maintenance

Wonderlic Personnel Test—18
Bennett Test of Mechanical Comprehension
(Form AA)—45
or
Bennett Test of Mechanical Comprehension
(Form BB)—37
Minnesota Paper Form Board Test—45.

These tests are administered in a controlled atmosphere by a test coordinator who follows the procedures outlined in the manuals prepared by the test publishers. Although there has been no challenge to the manner of administration, or scoring, of the Company's personnel testing, the plaintiffs contend that they operate so as to disqualify blacks at a significantly higher rate than whites from hir-

ing, promotion, and transfer. The Court concludes the evidence is insufficient to show any substantial impact of the Company's testing program as to the ability of blacks to obtain employment at the defendant's Pine Bluff mill. More recently, the Company has initiated a comprehensive process of validating its production and maintenance tests by the criterion-related method of test validation. Through this method, the Company has established a reasonable procedure for a determination of an applicant's capability to perform, successfully, particular jobs. This method of test validation is recognized in the profession and as governmental guidelines for employee selection. EEOC, Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1, et seq.; OFCC, Employee Testing Other Selection Procedures, 41 C.F.R. § 60-3.1, et seq.

Finally, the plaintiffs presented testimony to the effect that various members of the class had been the victims of discrimination on a personal, or individual, basis solely because of their race. The Court has given special attention, and somewhat critically, to the claims in each individual instance; the Court agrees that, from the testimony, it is clear that two basic factors characterize these charges of discrimination. First, it is apparent that they stem from misapprehension of the defendant's, I.P., employment practices. In the second place, they were not processed through, admittedly, available grievance channels. The Court, therefore, concludes that neither the Company, nor the defendant unions, are now giving any consideration to black employees for special treatment in a discriminatory manner. All employees, both black and white, are provided protection under present collective bargaining agreements, pursuant to the Jackson Memorandum

of Understanding, and are, thus, provided remedy for appropriate and good faith complaints.

Numerous witnesses on behalf of the plaintiffs, including Mr. Henry Lee Rogers, plaintiff, Mr. Fair and Mr. Randle, admitted that they were members of the union and were aware of their rights under the Contract as to grievance procedures. They testified that they had free access to the personnel office and the plaintiff, Rogers, admitted that he had been benefited monetarily by the filing and processing of the grievance. Although harassment has been claimed by some of the plaintiffs, the testimony discloses that, since the adoption of these protective procedures pursuant to the Jackson Memorandum, no grievances have been filed by any member of the affected class alleging harassment or racial discrimination.

From the substantial testimony presented, ore tenus, during the trial of the case, innumerable exhibits by all parties, stipulations, and the entire record, the Court makes the following conclusions of law:

1. The Court has jurisdiction of this action pursuant to 42 U.S.C. § 2000e-5(f); 42 U.S.C. § 1981; 28 U.S.C. § 1343 (4); 28 U.S.C. §§ 2201 and 2202.

2. International Paper Company is an employer in an industry affecting interstate commerce within the meaning of § 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b); the defendant labor unions are organizations engaged in an industry affecting commerce within the meaning of § 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(d) and (e).

3. Plaintiffs have complied with the procedural requirements of § 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(d) and (e).

4. This proceeding is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is defined as follows:

> "Those black employees employed and still employed since the commencement of this cause and all future employees of International Paper Company at its Pine Bluff, Arkansas, mill who are members or eligible to be members of Pulp and Sulphite Workers; Locals 898 and 946; Papermakers; Locals 731, 735, and 833; and IBEW".

5. The defendants, which are local unions, are for the purpose of this litigation, the agents of their respective international unions.

6. The defendant, International Paper Company, has a historical policy of hiring only blacks for certain jobs in the production of paper and related products in their various mills, including Pine Bluff, and only whites for other jobs within their mill operations, which constituted racial discrimination against black employees and, would be black employees. This historical policy of discrimination has been consistently reflected in collective bargaining agreements between the defendant, I.P., and the defendant unions.

7. The Pine Bluff paper mill was constructed, and commenced operation, in 1958. The historical policy of discrimination, or effects of such past discrimination, continued unabated until August 7, 1968.

8. Discrimination, as consistently practiced within the operation of the defendant's paper mill, constitutes an unlawful employment practice under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) and (c).

9. The collective bargaining agreements entered into periodically between the Company and the unions have had the effect of perpetuating past discrimination, or the effects of past discriminatory policies, since, under the terms of the agreements, qualified black employees employed prior to white employees remain at job levels on the various lines of progression below those white employees.

10. Employment practices which perpetuate, or tend to perpetuate, past discrimination are forbidden, by Title VII, to the extent that they are not supported by overriding legitimate, non-racial business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

11. The seniority system, as developed during the years of operation of the International Paper Mill at Pine Bluff, and which was agreed to by all of the defendants, has consistently been a condition of employment which discriminates against blacks in violation of Title VII of the Civil Rights Act of 1964.

In view of the ratification, and becoming parties to various collective bargaining agreements incorporating the seniority system after the effective date of Title VII of the Civil Rights Act of 1964, unlawful, discriminatory employment practices, and the effect of past discriminatory practices, continued until August 7, 1968.

12. The defendant's failure to institute adequate remedial measures, after the adoption of the Civil Rights Act

of 1964, Title VII, was a continuing violation of Title VII until the adoption of the two Memorandums of Understanding referred to as "Jackson Memorandum", first adopted August 7, 1968, and revised June, 1972.

13. The Court further concludes that the lines of progression at issue are essential to the proper operation of the defendant, I.P.'s, business and that they are functional and meet the needs of business necessity. The presently constructed lines of progression, at the defendant's Pine Bluff mill, strike a reasonable balance between the demands of the business and the rights of the members of the affected class, pursuant to the Jackson Memorandum of Understanding, as subsequently ratified by the defendant parties to this litigation. See Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968); U.S. v. Local 189, 301 F.Supp. 906, aff'd sub-nom, 416 F.2d 980 (5th Cir. 1969); cert. denied, 897 U.S. 919 (1970); U.S. v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); and Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

14. The seniority system, as presently provided by the collective bargaining agreements between the defendant parties, pursuant to the Jackson Memorandum of Understanding, adequately provides for the affected class to reach their "rightful place" in the Company's present employment scheme according to their qualifications. Brown v. Gaston County Dye & Machine Co., 457 F.2d 1377 (4th Cir. 1972).

15. It is established, and the Court concludes, that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the defendants, Company and unions, openly discriminated on the basis of race in the hiring and assigning of employees at the Pine Bluff paper mill.

16. Although, the Company initiated some changes toward the alleviation of discriminatory practices, after the promulgation of Executive Order 10925 in 1962, discriminatory practices, or the effects of past discriminatory practices, continued until the adoption of the Memorandum of Understanding at the conference in Jackson, Mississippi, on August 7, 1968. Effective as of that time, the members of the affected class, who were qualified, were given the opportunity of claiming their "rightful place" in any mill job vacancy on the basis of mill seniority with the Company at its Pine Bluff mill. From experience, after the Jackson Memorandum, other discrepancies, such as distinguishing between temporary and permanent assignment, recall rights, and job skipping, developed. These and other questions were the subject of consideration which resulted in the second Memorandum of Understanding, adopted in June of 1972. It follows, and the Court concludes, that although the defendants followed a policy of overt racial discrimination prior to the Civil Rights Act of 1964, effective July 2, 1965, the Court concludes that such conduct, and the effect thereof, ceased with the adoption of the Jackson Memorandum, August 7, 1968.

17. Prior to the adoption of the Civil Rights Act by Congress, the Company initiated a standardized testing program; it has been subject to continuing process of validation. It was not adopted as a result of this litigation, and no showing has been made that its use has resulted in discrimination. It is designed to determine qualifications of a person, not only for employment, but for assignment and promotion.

". . . Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

• • •

. . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Griggs v. Duke Power Co., 401 U.S. 424, 430-31.

The burden of proof to establish the contentions, as alleged in the Complaint, is upon the plaintiffs. Here the plaintiffs have the burden to show that, by the use of such tests, there is demonstrated adverse impact on the class they represent. However, once the plaintiffs show a discriminatory effect, the burden shifts to the defendants to prove the test's validity. Furthermore, the Congress has placed on the employer the burden of showing that any given requirements must have a manifest relationship to the employment in question. Griggs, supra, p. 432.

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. Griggs, supra, p. 433 n.9.

During the extended debate in the Congress on this section (§ 703(h)), proponents of Title VII sought to assure the critics that the Act would have no effect on job-related tests. On the Senate floor, the co-managers of the bill entered a memorandum explaining that the proposed Title VII, "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." Griggs, supra, p. 434.

An amendment was subsequently adopted to require that employment tests be job-related, § 703(h).

The defendant, I.P., presented extensive documentary evidence, together with expert testimony, on the question of the job-related nature of its testing program. The Court is impressed with the showing and, concludes from the evidence, that the tests utilized by the Company have been shown empirically to be highly correlated with successful performance on the maintenance and production jobs at the Pine Bluff mill. Allen v. City of Mobile, 331 F.Supp. 1134 (S.D. Ala. 1971). The Court, therefore, concludes that the Company has clearly established that the intent and purpose of the testing procedures is to "measure the person for the job and not the person in the abstract". Griggs, supra, p. 436.

18. The plaintiffs have alleged, and have attempted to prove, that the hiring practices of defendant, I.P., are discriminatory. The plaintiffs contend I.P. has consistently refused to hire blacks solely because of their race. The plaintiffs present statistical proof to show that the Company employs a disparately higher percentage of white

employees and, particularly, in certain categories of ement.

In Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir.), the Eighth Circuit Court of Appeals stated the well-established rule as follows:

> "We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C.A. §2000e-2(a). See United States v. Sheet Metal Workers Local 36, AFL-CIO, 416 F.2d 123 (8th Cir. 1969); Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); Plumbers Local 73, supra, 314 F.Supp. 160; Clark v. American Marine Corporation, 304 F.Supp. 603 (E.D. La. 1969); Lea v. Cone Mills Corporation, 301 F.Supp. 97 (M.D.N.C. 1969); Medical Society of South Carolina, supra, 298 F.Supp. 145; Dobbins, supra, 292 F.Supp. 413." p. 426.

Again, in United States of America v. N. L. Industries, Inc., and Chemical Workers' Basic Union, Local 1744, AFL-CIO, the Eighth Circuit Court of Appeals, in No. 72-1143, filed March 28, 1973 (not yet reported), stated at page 27:

> "The statistics themselves reflect evidence of discrimination, and 'In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts.' Jones, supra, 431 F.2d at 247."

Further, our Court stated that these lopsided ratios are not conclusive proof of past discriminatory hiring practices; however, they do present a prima facie case. The onus of going forward with the evidence and the burden of persuasion is thus on Hayes. Hays, supra, 456 F.2d 112.

In the instant case, no witnesses, on behalf of the plaintiffs, testified that they were rejected employment on the basis of their race. One witness, Mr. Blakely, testified as to the manner by which the Company informs the public when vacancies occur, stated that he learned about the employment opportunities at the mill by talking with other black members of the Pine Bluff community. The defendant, I.P., presented testimony which demonstrated that the current ratio of black applicants employed by the Company is higher than the ratio of white applicants. Specifically, since the adoption of the Jackson Memorandum in 1968, over 20% of all persons employed have been black. Out of a total of 108 composite net employees, 46 in that period have been black, which represents a gain of 42.6% of the total. Therefore, the statistics, relating to production workers, demonstrate that the Company's hiring practices do not discriminate against blacks. As to employment in the clerical field, the evidence establishes that there has been no hiring in this area for a significant period of time. In fact, during the last three years, the testimony reveals, only one clerical employee has been hired at the Pine Bluff mill. It is further established, by the testimony, that I.P.'s Personnel Manager has taken effective measures to establish a list of qualified black clerical applicants for any vacancies that might occur. Applicants are encouraged and received continuously, and periodically, the Company schedules such applicants for the clerical test administered by the Company.

Since the Company has demonstrated that its job-related testing procedures have resulted in the Company employing

significant numbers of black applicants and, the Company is continuously maintaining a list of qualified applicants in the clerical and office force, the Court concludes, and from the evidence in the record it is established, that the hiring policies and practices at the Pine Bluff mill are not discriminatory on the basis of race. Parham v. Southwestern Bell Telephone Co., supra, Ochoa v. Monsanto Co., 335 F.Supp. 53 (S.D. Tex. 1971).

This Court has previously approved the practice of utilizing the services of the local employment office in recruiting and hiring practices. The Court is of the opinion that, in view of the fast expansion of industry in the Pine Bluff area, and the ratio of black population to white in the area, and the educational opportunities afforded by educational institutions in the area, the Company should utilize the services of the local office as to the availability of qualified blacks in the area for employment when vacancies occur. Irvin v. Mohawk Rubber Company, 308 F.Supp. 152 (1970).

19. In determining the appropriate remedy for this class action proceedings, the Court possesses wide discretion in modeling a decree to insure compliance with the 1964 Civil Rights Act wherein a violation of Title VII has been found. See Hutchings v. United States Industries, Inc., 428 F.2d 303 (5th Cir. 1970); United States of America v. Sheet Metal Workers, Int'l. Ass'n., Local 36, AFL-CIO, 416 F.2d 123 (8th Cir. 1969); Local 53 of Int'l. Ass'n. of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); and United States v. Medical Society of South Carolina, 298 F.Supp. 145 (D.S.C. 1969).

The plaintiffs seek injunctive relief to enjoin the defendants from unlawful employment discrimination under Title VII, 42 U.S.C. § 2000e-5(g).

From the record in the case, the evidence establishes that the Company has demonstrated good faith efforts since the adoption of the Jackson Memorandum, August 7, 1968, and has continued, since that time, in its efforts to recruit black employees. The Company has demonstrated, as actual results show, that it continues to implement programs designed to assist blacks in obtaining employment with the Company on a non-discriminatory basis. The Company has further demonstrated that each applicant is considered on the basis of qualifications for the particular job sought by the applicant. As already stated, the Company should improve its procedures by publicizing its equal employment opportunity policy. Parham v. Southwestern Bell Telephone Co., supra.

The Company's record over the past four years is impressive and salutary. The Court recognizes that I.P. has shown considerable progress under its affirmative action program adopted in 1968. The thrust of this program, in seeking minority group individuals for employment, tends to overcome the discrimination built into the previous recruitment system which commenced in 1958. The record establishes that I.P.'s management personnel have undertaken greater supervision and implementation of its employment policies and programs. Parham, supra.

In view of this record, established by substantial evidence, numerous exhibits, depositions, and stipulations, the Court concludes that an injunction is unnecessary for Title VII compliance with the requirements for equal employment opportunities at this time. By the enactment of the Civil Rights Act of 1964, Congress placed great em-

phasis on private settlement and the elimination of unfair practices without resorting to the Court's injunctive powers. See 42 U.S.C.A. § 2000e-5; Hutchings, supra, 428 F.2d 303; Culpepper v. Reynolds Metals Company, 421 F.2d 888 (5th Cir. 1970); Jenkins v. United Gas Corporation, 400 F.2d 28 (5th Cir. 1968); Oatis v. Crown Zellerbach Corporation, 398 F.2d 496 (5th Cir. 1968); Quarles v. Philip Morris, Incorporated, 279 F.Supp. 505 (E.D. Va. 1968).

However, the Court reiterates its findings that the defendant I.P.'s recruitment policies and practices, initiated with the establishment of production at the Pine Bluff mill in 1958, which continued virtually unabated until the effective date of the Civil Rights Act, July 2, 1965, were discriminatory, based on race, although the Company attempted some change in policy following the issuance of the Executive Order of 1962. The Court also reiterates its findings that such discrimination, or the result of such discriminatory practices, continued from the effective date of the Civil Rights Act, July 2, 1965, until the adoption of the Jackson Memorandum, August 7, 1968. While recognizing that the Company has made tremendous progress in the hiring of black employees, and coordinating its efforts with the defendant unions, the Court thinks it should be noted that such progress preceded the plaintiffs' Complaint to the EEOC and the subsequent institution of this litigious proceeding on May 17, 1971. Such progress must not end with the cessation of this litigation. It is incumbent upon the defendant, I.P., to insure that its policies of equal employment opportunity continue to be implemented and enforced by all Company personnel engaged in employee hiring and promotion, notwithstanding existing collective bargaining agreements with the unions. Parham, supra.

In order that the findings and conclusions of the Court may be implemented, and any affirmative relief may be determined, the Court retains jurisdiction of this action, and the defendant, I.P., is directed to make periodic reports to the Court of its employment activities. See United States of America v. N. L. Industries, Inc., and Chemical Workers' Basic Union, Local 1744, AFL-CIO, supra.

20. With reference to the claim for back pay, an issue which by agreement of counsel for the parties was deferred, the Court takes cognizance of the opinion of the United States Court of Appeals for the Eighth Circuit, United States of America v. N. L. Industries, Inc., and Chemical Workers' Basic Union, Local 1744, AFL-CIO, No. 72-1143, filed March 28, 1973 (unreported), in which the Court laid down the rule as to such an award, as follows:

> "Despite what we have said as to the appropriateness of backpay, we do not make such an award here. In this Circuit the law in regard to backpay has not been adequately defined to provide employers and unions with notice that they will be liable for a discriminatee's economic losses due to continuation of past or present discriminatory policies." p. 49.

It is noted that this opinion by our Circuit Court of Appeals was rendered approximately one year after the conclusion of the hearing in the instant proceedings. In view of this rule, by our own Eighth Circuit Court of Appeals, this Court adopts the rule in this case. However, as the Court stated in United States of America v. N. L. Industries, Inc., et al., supra, where an employer and the unions have had ample opportunity to remedy unlawful employment practices, they should be put on

notice that they will be held responsible for the economic losses accruing to the parties injured by such unlawful policies.

21. Although the Court finds no injunction warranted, this litigation has, without doubt, acted as a catalyst which partially prompted the defendants to take some action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, the plaintiffs have performed a valuable public service in bringing this action. Having prevailed in their contentions of prior racial discrimination against blacks generally, the plaintiffs are entitled to their costs, including reasonable attorneys' fee. The Court, taking judicial notice of the tremendous work in the preparation, discovery, and trial of the case and the voluminous record developed during the course of the proceedings, is of the opinion that the plaintiffs are entitled to recover from the defendants, jointly and severally, their costs, and in addition thereto, reasonable attorneys' fee in the sum of $15,000.00 to compensate the plaintiffs' attorneys for their work and efforts, authorized by 42 U.S.C. § 2000e-5(k). See Parham v. Southwestern Bell, supra; Clark v. American Marine Corporation, 304 F.Supp. 603 (E.D. La. 1969); and Irvin v. Mohawk Rubber Company, 308 F.Supp. 152 (1970).

The Court incorporates its findings and conclusions pursuant to Rule 52 of the Federal Rules of Civil Procedure.

An Order will be entered in accordance, and consistent with this Memorandum Option.

Dated this 10th day of December, 1973.

OREN HARRIS
United States District Judge

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 74-1086, 74-1087
74-1101, 74-1115

HENRY LEE ROGERS, *et al.*,
Appellants-Cross-Appellees,

v.

INTERNATIONAL PAPER COMPANY, *et al.*,
Appellees-Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: October 14, 1974

Filed: January 7, 1975

Before:

HEANEY, BRIGHT and ROSS,
Circuit Judges.

Ross, *Circuit Judge.*

Henry Rogers, Lee Smith and N. A. Thompson, on behalf of themselves and other blacks similarly situated, brought this action against International Paper Company [hereinafter I.P.] and I.P. unions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), 42 U.S.C. §1981,

and 29 U.S.C. §§ 151 *et seq.* The complaint alleges racially discriminatory employment policies were practiced by I.P. at its Pine Bluff Mill in four general employment classifications: production departments, maintenance craft jobs, office and clerical jobs, and supervisory positions.

After a lengthy trial and upon detailed factual evidence, the district court concluded, with respect to production jobs, that although I.P. had clearly discriminated in past job assignments and although its seniority system had perpetuated the effects of that past discrimination, I.P.'s Memorandum of Understanding negotiated between I.P. and the Office of Federal Contract Compliance under Executive Order 11,246 substantially eliminated the effects of the former discriminatory policy. Respecting maintenance craft jobs the court concluded there was no overt discrimination against blacks and the tests administered as a prerequisite to employment for those jobs were not shown to have a racially disparate impact, nor, in any event, to be unrelated to job performance. Third, the district court noted there had been no hiring for office and clerical positions for a significant period of time and concluded that I.P. had undertaken effective measures to remedy any discrimination in office and clerical employee selection by establishing a list of qualified black clerical applicants. The district court did not address the question of discrimination in supervisory employee selection. Upon those bases, the court denied injunctive relief. For the reasons hereinafter set forth, we reverse and remand.

I. Internal Structure.

The Pine Bluff Mill, located in Jefferson County, Arkansas, is one of a number of such facilities maintained by I.P. for treatment and conversion of wood into paper. It com-

menced production in 1958 and, at the time of trial, employed 1,443 employees, of which 118 were black. The population of Jefferson County is 30% black. The mill consists primarily of production departments which process wood into paper and maintenance craft departments which are responsible for repairing and maintaining the machinery used at the mill. Also employed at Pine Bluff are supervisory personnel and office and clerical personnel.[1] Of the 160 supervisory personnel, one accountant hired in 1969 is black.

Production workers are organized into ten departments[2] which, in turn, are subdivided into various lines of progression [LOP] based either upon the type of job performed or geographic proximity to other jobs in a particular LOP. As a worker ascends in the LOP his pay rate increases. Associated with many of these departments are labor pools into which employees are hired by I.P. and from which laborers are assigned to various entry level jobs in a LOP as temporary or permanent vacancies therein occur. Also in the production area, but not associated with any specific department or LOP, are various miscellaneous hourly jobs. Under the collective bargaining agreements in effect at Pine Bluff, promotion, demotion, layoff and recall are determined on the basis of seniority of which there are three types: company or mill seniority, department seniority, and job seniority.[3]

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[1] In this appeal neither the plaintiffs nor the United States Equal Employment Opportunity Commission challenge the findings of the district court relating to office and clerical jobs.

[2] Wood Yard, Pulp Mill, Laboratory, Beater Room, Machine Room, Polyethylene Extruder, Finishing and Shipping, Storeroom, Equipment, and Power Plant.

[3] Company seniority is the length of service with the company. Department seniority is the length of service in a department or line of progression. Job seniority is the length of service on a job in a line of progression.

Prior to 1962 all of the production jobs were segregated on the basis of race. The Wood Yard Department was the only production department permitting blacks. Various miscellaneous jobs were designated black jobs and the General Yard Crew was a black labor pool. The black jobs were generally less desirable, lower paying, and more physically demanding. Subsequent to 1962 this situation changed as will be hereafter discussed.

The maintenance crafts jobs are organized into three departments[4] and are represented by various skilled crafts,[5] both journeyman and apprentice status. These are the highest paying hourly positions at I.P. The company, based upon test results achieved on a battery of tests, effectuates hiring of these employees into the apprenticeship programs. Applicants therefor must be under 25 years of age, or 29 if the applicant is an I.P. incumbent employee. Job training and union membership follow. Until 1962 the bargaining representatives for these crafts were segregated white unions. Thus the maintenance crafts at Pine Bluff were all white. At the time of trial, two black apprentices had been hired into the 255 skilled craft positions at the Pine Bluff Mill.

II. Supervisory Personnel.

In a recent class action challenge alleging employment discrimination we have noted that employment policies affecting supervisory and managerial positions are not insulated from the reaches of Title VII enforcement. *Gilmore* v. *Kansas City Terminal Ry.*, No. 74-1207 (8th Cir., January , 1975). In that case we held that statistical data may establish a prima facie case of employment discrimination, specifically in the context of supervisory personnel, and that such a showing shifts the burden to the employer to rebut the inference that racial considerations have dictated employment choices. *Id.* at 6. When a defense of lack of minority qualification is interposed by the employer, we there held that an employer may rebut the prima facie case of discrimination upon a showing that the required qualifications have a manifest relationship to the employment in question. *Gilmore* v. *Kansas City Terminal Ry., supra,* at 7. Thereafter, it is open to plaintiffs to demonstrate a violation of Title VII on either of two independent bases: "that the employment policies reflect present discriminatory conduct or that current policies, though neutral on their face, carry forward vestiges of past discrimination." *Id.*

Here, by means of the statistic that only one black has been hired for a supervisory position, the plaintiffs have made a prima facie showing of racial discrimination by I.P. in its employee selection policies for supervisory personnel.[6] The record does not demonstrate that I.P. interposed any defense to this aspect of the class action complaint. Because the trial court, in defining the class, excluded supervisory employees, and since I.P. did not

[4] Maintenance, Electrical, and Instrument.

[5] Pipefitters, Carpenters, Insulators, Millwrights, Welders, Steelworkers, Boilermakers, Sheet Metal Workers, Machinists, and Auto Mechanics.

[6] Even though proof was offered and received as to supervisory employees, the district court defined the class in this action as

> "Those black employees employed and still employed since the commencement of this cause and all future employees of International Paper Company at its Pine Bluff, Arkansas, mill who are members or eligible to be members of Pulp and Sulphite Workers; Locals 898 and 946; Papermakers; Locals 731, 735, and 833; and IBEW."

On remand the district court should redefine the class to include supervisory employees.

present evidence to rebut the prima facie statistical showing of racial discrimination, we remand this aspect of the case to the trial court for further hearings and a determination as to whether or not there has been racial discrimination in the hiring of supervisory employees by I.P. If the trial court determines there has been such discrimination it shall then fashion an appropriate remedy. In resolving this issue the district court should apply the following standards.

A. Current Discrimination.

Proof of intent. Notwithstanding the provision in Title VII allowing injunctive relief and back pay only where the respondent has intentionally engaged in unlawful practice, 42 U.S.C. §2000e-5(g), courts have established that proof of discrimination does not require proof of intent to discriminate. All that is required is that the employment practice not be accidental. *See, e.g., Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). The Supreme Court has adopted this interpretation. In *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971), the Court stated that, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *See also United States* v. *N. L. Industries,* 479 F.2d 354, 361 (8th Cir. 1973) (and cases cited therein).

Overt discrimination. Overt discrimination may be demonstrated by the production of qualified minority applicants for past vacancies who were rejected for a less qualified white person. If such employer conduct is established, a deliberate purpose to discriminate may be inferred and close judicial scrutiny of employment practices

is warranted. In *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377, 1382 (4th Cir. 1972), the court observed:

> Courts have often observed that proof of overt racial discrimination in employment is seldom direct. Recognizing this, we have found "error in limiting Title VII to present specific acts of racial discrimination," and it is now well established that courts must also examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists. (Citations omitted.)

Recruitment. Evidence of discrimination by design might also be based upon a history of minimal recruitment efforts in publicizing vacancies and openings in supervisory and management positions. The passive nature of past recruitment together with the failure to undertake affirmative recruitment efforts after the passage of Title VII may justify a finding of discriminatory conduct. *United States* v. *N. L. Industries, supra,* 479 F.2d at 368; *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421, 426-27 (8th Cir. 1970); *United States* v. *Sheet Metal Workers Local 36,* 416 F.2d 123, 139-40 (8th Cir. 1969).

Examination of criteria. A final method in the assessment of present discriminatory conduct is the examination of the supervisory selection and promotion criteria employed by I.P. Such criteria are especially susceptible to employer practices which discriminate in fact under a facade of apparent neutrality. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431, in holding unlawful an employer's use of a written test not shown to have been related to job performance, teaches that employee selection criteria must be scrutinized. Under *Griggs,* an employer must demonstrate that hiring and promotional requirements with

a racially disparate effect "have a manifest relationship to the employment in question." *Id.* at 432.

Where objective criteria are employed the EEOC guidelines on Employer Selection Procedures, 29 C.F.R. § 1607 *et seq.* cited with approval by the Court in *Griggs, supra,* 401 U.S. at 434, as expressing the will of Congress, control. They require generally that empirical evidence must demonstrate a significant correlation between the test employed and important elements of work behavior.

Greater possibilities for abuse, however, are inherent in subjective definitions of employment selection and promotion criteria. Yet they are not to be condemned as unlawful per se, for in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone. Thus, it is especially important for courts to be sensitive to possible bias in the hiring and promotion process arising from such subjective definition of employment criteria. The EEOC guidelines,[7] the Executive Order program,[8] and the courts have all established

[7] Those guidelines, which set forth validation standards for objective professionally developed tests, also state that:

> Selection techniques other than tests . . . may be improperly used so as to have the effect of discriminating against minority groups. . . . Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5.

29 C.F.R. § 1607.13 (1973). That passage suggests that even subjective criteria must be validated by the employer.

[8] Executive Order 11,246, regulating employment practices of employers with government contracts, also requires empirical validation for "selection techniques other than tests," including unscored interviews, unscored application forms, and records of educational and work history, if such techniques have the effect of discriminating against blacks. 41 C.F.R. § 60-313 (1973).

the requirements of, and in most cases a measure for, examining subjective hiring and promotion criteria. At the very least, it is necessary to identify the goals underlying the subjective criteria through a job analysis. Examination of those goals might reveal underlying personal biases or discriminatory stereotype classifications. *See, e.g.,* EEOC Dec. No. 72-0721 (Dec. 27, 1971), 4 FEP Cases 439 (1972). It may additionally appear that subjective preference is accorded factors which are discriminatory, as for example, education accomplishment when such is not shown to be related to job performance,[9] a history of arrest records,[10] a history of wage garnishment,[11] or personal references that are nepotistic or culturally biased.[12] If there is any evidence of a discriminatory policy, courts have in the past

[9] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). The Court there observed that "History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees." *Id.* at 433. *See also Carter* v. *Gallagher*, 452 F.2d 315, 326 (8th Cir 1971), *modified on rehearing en banc*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 U.S. 905 (1972); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1141-45 (1971).

[10] *Carter* v. *Gallagher, supra*, 452 F.2d at 326; *Gregory* v. *Litton Systems, Inc.*, 316 F.Supp. 401, 403 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972). *See also* Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1151-52 (1971). *Compare Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 241 (1957).

[11] *Wallace* v. *Debron Corp.*, 494 F.2d 674, *passim* (8th Cir. 1974); *Johnson* v. *Pike Corp. of America*, 332 F.Supp. 490, *passim* (C.D. Cal. 1971).

[12] *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 427 (8th Cir. 1970); *Asbestos Workers Local 53* v. *Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969).

closely circumscribed and even rejected practices of personal interviews,[13] supervisory recommendations,[14] and other subjective hiring criteria.[15]

B. Neutral Practices Perpetuating Vestiges of Discrimination.

The Supreme Court has announced that a district court has:

> not merely the power but the duty to render a decree which will so far as possible eliminate the *discriminatory effects of the past* as well as bar like discrimination in the future.

Louisiana v. *United States*, 380 U.S. 145, 154 (1965) (emphasis added). As applied to employment discrimination cases, the concept which originated in *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va. 1968) that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act, was adopted by the Supreme Court in *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 430:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent,

[13] *United States* v. *Sheet Metal Workers Local 36*, 416 F.2d 123, 136 (8th Cir. 1969); *Chance* v. *Board of Examiners*, 330 F.Supp. 203, 223 (S.D. N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

[14] *United States* v. *N. L. Industries*, 479 F.2d 354, 368 (8th Cir. 1973); *Leisner* v. *New York Telephone Co.*, 358 F.Supp. 359, 369 (S.D. N.Y. 1973). *See also* EEOC Dec. No. 7094 (Aug. 19, 1969), 2 FEP Cases 192, 193 (1971).

[15] *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382-83 (4th Cir. 1972); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971). *See also* EEOC Dec. No. 72-0265 (Aug. 6, 1971), 4 FEP Cases 68 (1972).

> cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Pre-Act discriminatory conduct is thus an integral component in the calculus of employment discrimination and remedial relief. *United States* v. *N. L. Industries*, *supra*, 479 F.2d at 360-61 (and cases therein cited). Neutral policies which perpetuate past discrimination cannot be continued unless there is a showing of "compelling business necessity." *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301, 308, (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973). *See also Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431: *United States* v. *N. L. Industries*, *supra*, 479 F.2d at 364-65. Such a business necessity "'connotes an irresistible demand.' The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal." *United States* v. *St. Louis-San Francisco Ry.*, *supra*, 464 F.2d at 308. In *United States* v. *N. L. Industries*, *supra*, 479 F.2d at 365, we stated:

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (Citation omitted.)

Thus where the prescribed qualifications rest on factors, the ability to obtain which was denied minority applicants under past discriminatory policies, then the criteria must be modified, to the extent possible, so as to substitute

functionally equivalent criteria which does not have a discriminatory effect. Only when there are "available no acceptable alternative policies or practices which would . . . accomplish [the business purpose advanced] equally well with a lesser differential racial impact," might a neutral policy perpetuating prior discrimination be retained. *United States* v. *N. L. Industries, supra,* 479 F.2d at 365.

III. Maintenance Craft Jobs.

The two issues raised on appeal relating to I.P.'s employee selection practices for skilled craft jobs, are governed by different theories under Title VII. The first challenge, I.P.'s use of a battery of standardized tests[16] as selection devices for maintenance craft jobs,[17] rests upon the determination of whether these tests constitute subtle examples of present discrimination. The second issue, temporary enlargement of the minority entry level age limitation for the skilled crafts; is governed by considerations of whether such relief is necessary to dispel the effects of past discrimination and render whole the former discriminatees. Thus we treat these issues separately, but we do not intimate that test validation and entry-level age adjustments may be exclusive remedies for skilled crafts ap-

[16] Wonderlic, Bennett, and Minnesota Paper Form tests. These tests have been the subject of repeated challenges under Title VII. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) [Wonderlic and Bennett]; *Duhon* v. *Goodyear Tire & Rubber Co.*, 494 F.2d 817 (5th Cir. 1974) [Wonderlic and Bennett]; *United States* v. *Georgia Power Co.*, 474 F.2d 906, 911 n.3, 912 n.5 (5th Cir. 1973) [Bennett and Wonderlic]; *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134, 138 (4th Cir. 1973) [Wonderlic].

[17] The Wonderlic and Bennett tests are also employed as selection criteria for production positions. Lower cutoff scores, however, are applied and on this record the tests thus applied have not been shown to have an exclusionary impact on minority applicants for production positions.

plicants. Our considerations on appeal do not diminish I.P.'s obligation to undertake positive measures to dispel the residual effects of admitted prior discrimination under Title VII, 29 C.F.R. § 1607.14, or under the Executive Order[18] program, 41 C.F.R. § 60-3.14. *See generally,* Note, Remedial Minority Employment, 56 Minn. L. Rev. 842, 844-45 (1972). The determination of the perimeters of affirmative relief, however, is committed to the district court on remand in the exercise of its inherent "equitable power to remedy past wrongs" "once a right and a violation have been shown." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 462 U.S. 1, 15 (1971).

In analyzing the legitimacy of testing devices as prerequisite to employment, several principles are significant. In *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431, the Supreme Court held that employment practices which "[operate] to exclude Negroes [and] cannot be shown to be related to job performance" were "artificial, arbitrary, and unnecessary barriers to employment" and therefore were prohibited. The Court also held that "Congress has placed on the employer the burden of showing that any given requirement [has] a manifest relationship to the employment in question," *id.* at 432, and that the EEOC guidelines on Employer Selection Procedures, 29 C.F.R. § 1607, expressed the will of Congress and were thus a

[18] Under Executive Order 11,246 the Office of Federal Contract Compliance (OFCC) monitors Government contractors and subcontractors. The Executive Order requires that no government contractor or subcontractor shall discriminate against employees or applicants for employment because of race, color, religion, sex or national origin. Additionally the contractor is required to take affirmative action, *see* 41 C.F.R. § 60-2, to guarantee that members of an affected class who, by virtue of past discrimination, continue to suffer the present effects of that discrimination, are employed and that such employees are treated during employment without regard to race, color, religion, sex or national origin.

measure relevant to demonstrating manifest relationship to employment. *Griggs, supra,* at 434. That burden, however, does not shift to the employer until the plaintiff has shown a discriminatory effect of the challenged employment requirement. *Id.* at 431; *Gilmore* v. *Kansas City Terminal Ry., supra,* slip opinion at 6-7; *United States* v. *Georgia Power Co.,* 474 F. 2d 906, 912 (5th Cir. 1973); *Moody* v. *Albemarle Paper Co.,* 474 F. 2d 134, 138 (4th Cir. 1973); *Chance* v. *Board of Examiners,* 458 F. 2d 1167, 1176 (2d Cir. 1972). Yet such a showing of discriminatory impact may be prima facie established by statistical data. *Gilmore* v. *Kansas City Terminal Ry., supra,* slip opinion at 6 (cases therein cited).

The district court here concluded that the evidence was "insufficient to show any substantial impact of the Company's testing program as to the ability of blacks to obtain employment at the defendant's Pine Bluff mill." However the evidence relating to racial success on the tests was meager. I.P. either did not maintain such records or withheld them for they were not available upon plaintiffs' discovery requests nor inquiries at trial. The court apparently relied upon the statistic urged by I.P. that 2 of the 5 incumbent black applicants for transfer to maintenance craft positions were accepted, while only 7 of 59 white applicants were selected. Thus black opportunity for transfer was 40% while white opportunity was only about 11.9%. These figures are somewhat elusive, however. First, the statistical population itself, incumbent employees seeking transfer, represents a discriminatorily conceived pool and does not reflect a typical composition of applicants for maintenance craft positions at Pine Bluff based upon geographical minority population. Second, the two blacks who successfully transferred did so after I.P.'s 1968 commitment to provide affirmative promotional and transfer relief for

incumbent former discriminatees. Finally, evidence of a test's discriminatory effect is not confined to the ultimate hiring and rejection ratios. "The use of any [unvalidated] test which adversely affects hiring, promotion, transfer or any other *employment . . . opportunity* of classes protected by title VII constitutes discrimination". 29 C.F.R. § 1607.3. *See, e.g., Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F. 2d 1364, 1372 (5th Cir. 1974); *United States* v. *Georgia Power Co., supra,* 474 F. 2d at 912 n. 5; *Chance* v. *Board of Examiners, supra,* 458 F. 2d at 1176.

Better evidence of the test's racial impact can be found in the testimony of the personnel director at Pine Bluff who was aware of no black success[19] in 1962 on the Wonderlic and Bennett tests for production transfer eligibility. This was confirmed by one of the Pine Bluff black employees. Similarly he did not believe that any blacks passed the production battery of tests in 1967 or 1968. There is, however, some conflicting evidence on this latter point for one of plaintiffs' witnesses testified that two blacks passed in 1968. The fact remains, however, that as late as 1971, only two blacks had been hired into the apprentice program at Pine Bluff. Black employees were virtually excluded even from production transfer until 1968 and passing scores for production transfer were even lower than minimal scores for skilled craft admittance. And company officials, notably the Industrial Relations Manager at Pine Bluff, were aware of and expressed disappointment over the poor minority success on the test batteries.

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[19] Applicants for transfer to other production lines of progression were originally similarly required to pass the same Wonderlic and Bennett tests required of maintenance employee applicants. Cutoff scores, however, were set lower than minimal passing scores for transfer to skilled crafts jobs. These scores for production transfer were themselves lowered in later years.

This statistical evidence, then, though partly based on tests administered to production employees, is sufficient to show the racially disparate impact of the skilled crafts' testing program, *see also Boston Chapter, NAACP, Inc.* v. *Director and Commissioner of Civil Service,* No. 74-1067, slip opinion at 5-6 (1st Cir., Sept. 18, 1974), and to shift the onus of validation to I.P., which appropriately came forward with evidence of attempted validation the district court determined to be adequate. The legal issue, then, on review in this case resolves to the sufficiency of the validation study as persuasive evidence that the test battery is truly predictive of job performance. For this we turn to the EEOC guidelines.

Under the guidelines, "[e]vidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the jobs or jobs for which candidates are being evaluated." 29 C.F.R. §1607.4(c). Three procedures are cited as the generally acceptable methodology for satisfying those requirements: criterion-related validity, content validity, and construct validity.[20] The latter two are per-

[20] Criterion validity correlates test scores with some measure of job success. It can be accomplished by two methods: predictive validation or concurrent validation. "'Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired'; 'Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job.'" *Vulcan Society of New York City Fire Dept.* v. *Civil Service Comm. of N.Y.*, 490 F. 2d 387, 394 (2d Cir. 1973). Content validity correlates the content of the test with the content of the job and is generally used to determine the validity of achievement tests. Construct validity matches an employment test with results of some other test known to measure the relevant characteristics.

missible only where criterion-related validity is not feasible. 29 C.F.R. § 1607.5(a). Here I.P. undertook a predictive criterion-related validity study for higher than entry level jobs, a permissible undertaking for a validity study under 29 C.F.R. § 1607.4(c)(1). Supervisor raters were asked to rate workers in the sample under a paired comparison rating technique.[21] The rating lists were then matched with test battery results to determine whether those tests had been an adequate measure of job performance. We note several deficiencies in this validation study.

Sample deficiencies and lack of differential validation. The samples were small and they included no minority skilled craft employees. Neither was there a differential validation study performed. Under 29 C.F.R. § 1607.5(b)(1), "[w]here a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population." Under 29 C.F.R. § 1607.5(b)(5), data must be generated and results separately reported for minority and nonminority groups wherever technically feasible.

Here, however, I.P.'s Pine Bluff Industrial Relations Manager, his assistant, and the expert psychologist called by I.P. all represented in their testimony that no attempts

[21] This technique was explained by I.P.'s Industrial Psychologist as:

> "[Y]ou make up a little slip, put each pair of guys in the group to be rated, so everybody is paired with everybody else. And the rater then goes through that little booklet and he checks each pair. He checks the one man of those two doing the better job on his job . . . . So when he gets through, every man has been paired with every other man. Then you tally those, and the guy that gets the most tallies is 'superior' . . . and the guy that gets the fewest tallies is . . . bottom."

were made to conduct a differential validation, to include blacks in the validation studies, or even to maintain records of black performance on the standardized tests. Under the guidelines, the burden of establishing that noncompliance with any of the minimal validation standards is not technically feasible is on the employer. 29 C.F.R. § 1607.4(b). It would seem that black performance on the tests could easily have been calibrated by I.P. since the tests have been administered to blacks since 1962 for both production and maintenance applicants. Similarly, balance in the racial composition of the samples could seemingly have been achieved, as well as differential validation, by selecting validation samples from other I.P. mills or even other companies within the industry where similar tests were employed and minority representation was adequate. Such statistics are permissible under the guidelines where (a) the studies pertain to jobs which are comparable, and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. 29 C.F.R. § 1607.7.

I.P.'s casual disregard of the obligation to undertake differential comparisons on test results and in validation studies falls short of proof of technical nonfeasibility. The absence of differential validation and the deficiencies in the sample composition, therefore, render the study inadequate. *See also United States* v. *Georgia Power Co., supra*, 474 F.2d at 914-15, 916; *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

Job Analysis. 29 C.F.R. § 1607.5(b)(3) establishes as one of the critical standards for validation that:

> The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. . . . Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analysis.

Here there were no adequate job analyses performed. Raters were given general guidelines then directed to select the better of two employees in various pairs. The guidelines apprised the raters to consider factors such as quality of work on the job, quantity of work on the job, ability to work with others, ability to direct a crew if that were required of a job, job knowledge and safety awareness. There were, however, no individualized analyses for each of the different jobs under consideration. Although somewhat constrained, the rating process here was still principally subjective. We have in the past condemned the use of such nebulous standards. *United States* v. *N. L. Industries, supra*, 479 F.2d at 368; *United States* v. *Sheet Metal Workers Local 36, supra*, 416 F.2d at 137-138. Where, as here, subjective evaluations are used in the very process of test validation, a similar potential for abuse exists. Moreover, job analyses are intended to be a careful quantification of criteria that "represent major or critical work behaviors" for the individual jobs. 29 C.F.R. § 1607.5(b)(3). "A job analysis for one [job] . . . would not necessarily be suitable for another." *Walston* v. *County School Board of Nansemond County*, 492 F.2d 919, 926 (4th Cir. 1974). There is no indication that these general guidelines here were individualized for the wide variety of jobs examined. The resulting absence of proper and careful job analyses, therefore, is fatal to the validation study. *See Moody* v. *Albemarle Paper Co., supra*, 474 F.2d at 139; *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351, 1355 (N.D. Cal. 1972).

Utility of the test. Several infirmities arise here. First, each of the battery tests was not validated for each job for which the test is a prerequisite of employment.[22] This offends 29 C.F.R. § 1607.4(c) because a failing score on any one of the three tests disqualifies an applicant from employment in a skilled craft position at Pine Bluff. Since each test then effectively exercises an absolute veto prerogative, each must be validated to show significant correlation with respective job performance. *See Moody* v. *Albemarle Paper Co., supra,* 474 F.2d at 138, 140. Additionally we note that for 9% of the cases considered there was no correlation between the test scores and job performance. If a test does not prove statistically significant for a given job, it cannot be employed as a selection criterion. 29 C.F.R. § 1607.5(c)(1). *See also United States* v. *Georgia Power Co., supra,* 474 F.2d at 915. Under *Griggs,* the test battery is prohibited for at least those 9% cases where the test bears no demonstrable relationship to the employment in question. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431. Finally the evidence strongly suggests that the cutoff scores[23] have been set too high. For example 40% of the skilled craftsmen in a sample of machinists and millwright journeymen would have been unable to achieve admission to their respective crafts under the present standards. Some justification must be proffered for the level of cutoff adopted under these circumstances. *See Walston* v. *County School Board of Nansemond County, supra,* 492 F.2d at 927.

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[22] Wonderlic correlations were reported for six skilled craft groupings; Bennett correlations, for nine groupings; and Minnesota Paper Form correlations for only one grouping. By contrast, there are thirty skilled craft jobs at Pine Bluff.

[23] The cutoff scores on the test battery for skilled crafts jobs at Pine Bluff are: Wonderlic, 18; Bennett, 45, Minnesota Paper Form, 45.

Thus we conclude that on remand the trial court should direct I.P. to conduct new validation studies conforming to the standards set forth herein and take such additional evidence as is necessary to permit the trial court to determine whether or not the administration of the tests has in fact resulted in a racially discriminatory hiring or transfer policy. If the trial court determines that the tests have had such result, it should then devise a remedy which will: (a) determine which tests are permissible under the standards set forth herein and the proper cut-off score for each test; (b) direct that prior applicants who have taken the tests and whose scores meet the revised standards be offered employment in maintenance craft jobs on a preferred basis as vacancies become available with the same seniority which would have resulted if they had been employed in maintenance craft jobs as of the time of their first application, and (c) offer all other members of the affected class an opportunity to take the tests under the revised standards and give hiring or transfer preference to those who pass the tests under the revised standards.

The second question on appeal concerning relief for minority maintenance crafts' applicants[24] is the request for temporary enlargement of the entry level age limitation. By reason of past discrimination,[25] because there was no showing of business necessity[26] for the present age limitation, and because I.P. presently permits incumbent pro-

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[24] We leave for determination of the trial court the request that the apprenticeship program be shortened in the case of minority applicants.

[25] *Carter* v. *Gallagher, supra,* 452 F.2d at 326.

[26] *United States* v. *N. L. Industries, supra,* 479 F.2d at 364; *United States* v. *St. Louis-San Francisco Ry.,* 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973).

duction workers who have been bumped down to entry level positions in their departments to enter the apprenticeship programs up to the age of 36, the entry level age for admission to the skilled crafts apprenticeship programs should be enlarged to age 36 as to all members of the affected class, until the district court determines that there is sufficient minority representation in I.P.'s maintenance craft jobs. *See Carter* v. *Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 U.S. 1107 (1973). The details of this remedy are left to the district court on remand.

IV. Production Jobs.

From the commencement of operations at the Pine Bluff mill until 1962, employees were assigned to production jobs on the basis of race. However, pursuant to Executive Order 10,925,[27] I.P. announced a policy of racial desegregation for both the physical facilities at the mill and admission into lines of progression. Initial company focus was directed towards desegregation of the physical facilities and only one black was permanently assigned to a white job prior to 1967.[28]

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[27] Executive Order 10,925 has been superseded by Executive Order 11,246.

[28] This was due in large part to the fact that in 1962 I.P. began to require black applicants for employment and transfer to pass tests previously given only to whites. Minimal passing scores for production jobs were set at 18 and 38 on the Wonderlic and Bennett tests respectively. In 1968 the testing requirements for production jobs were reassessed and thereupon reduced to 15 and 20 respectively. Significantly greater numbers of black applicants have since been hired for production jobs. The present testing requirements for production employment do not now appear to have an adverse racial impact.

In 1968, the Office of Federal Contract Compliance, in the execution of the Executive Order program, advised I.P. that they had failed to comply with the nondiscrimination requirements of the Executive Order and that, in order to retain government contract privileges, they would have to change employment practices. A conference with representatives of the Southern Kraft Division of I.P. was thereupon called by OFCC in Jackson, Mississippi, to discuss necessary modifications for Executive Order compliance. A Memorandum of Understanding, negotiated at that meeting and endorsed by the affected unions and representative mills, was approved by the OFCC as sufficient for compliance with the Executive Order. That memorandum, dealing only with production jobs, created remedial transfer, promotion and recall opportunities for members of an "affected class," defined as all black incumbent employees hired before September 1, 1962, and those additional blacks hired into black jobs after 1962.[29] The memorandum provided that members of the affected class could compete against other applicants[30] for entry level positions in any other line of progression on the basis of mill seniority, so long as an affected class member's qualifications were as high as the minimally qualified employee currently working in the line.[31] Affected class members who transferred under these provisions were offered wage maintenance protection so as not to deter the exercise of

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[29] At the time of trial, that class consisted of 57 employees.

[30] Usually such applicants came from the labor pools associated with a specific department and therefore competed on the basis of department seniority, a less general form of contract seniority.

[31] The effect of this proviso was to eliminate the test battery requirement for affected class transferees to other production LOP's.

the transfer rights to lower paying entry level jobs in other lines of progression.[32] The memorandum also established that promotion, demotion, layoff, and recall rights of affected class members would be governed by mill seniority whenever a class member was in competition with a nonclass member. Finally the memorandum provided that negotiations were to take place at the mill level, between local management and local unions regarding possible merger or shortening of lines of progression, job skipping, and advanced level entry.[33]

In May, 1969, upon I.P.'s request, OFCC issued a clarification of the Jackson Memorandum's provisions relating to promotion and recall. As I.P. had been administering the Memorandum, affected class employees either permanently *or temporarily*[34] classified on the job immediately preced-

[32] Any affected class member requesting transfer within six months could have his former permanent wage rate "red circled," the effect of which was to retain that rate after transfer in those cases where the transferee position was rated at a lower wage than his former laborer wage. The maximum "red circle" rate was $3.00 per hour. Most, but not all, affected class members earned less than this amount.

[33] As a result of Pine Bluff local negotiations, two jobs were added to the top of the Wood Yard line of progression (the formerly all black line of progression) and one formerly black miscellaneous job was incorporated into each of the Pulp Mill and Beater Room lines of progression. No lines of progression were shortened. Job skipping and advanced level entry were apparently not discussed.

[34] When a temporary vacancy occurs somewhere in a line of progression, for example as a result of vacation, medical, or military leave, temporary assignments, called temporary set-ups, are made to fill the vacancy. These assignments are determined on the basis of job, then department, seniority. Thus when a vacancy occurs in the middle of a line of progression, under the bidding and seniority provisions operative, the person in the position immediately below the vacancy is generally assigned to fill the temporary vacancy, thereby creating another temporary vacancy.

ing the vacancy, could be considered to fill the permanent vacancy and could compete with nonaffected class members on the basis of mill seniority. The Union had opposed this practice, since under the collective bargaining agreement only those permanently assigned to immediately preceding jobs were eligible for permanent promotions, and also had contended that affected class members could not compete on the basis of mill seniority against those eligible for recall to an entry level position in a line of progression. The OFCC response, called the McCreedy Letter, authorized the company to either establish residency requirements for each job representing minimal time periods essential to qualification for advancement, or to limit competition for permanent vacancies to those permanently assigned to the immediately preceding job classifications. I.P. chose the latter course. The McCreedy Letter also eliminated affected class mill seniority competition against incumbent employees with recall rights for entry into a line of progression.

After the trial of this matter below, a revision of the Jackson Memorandum was tentatively adopted. The 1972

The net effect of this process is that several persons in the line of progression temporarily advance up the line and create a temporary vacancy in the entry level position at the bottom of the line. The longer the individual line of progression, the greater the chance for temporary set-ups. Oftentimes, then, employees temporarily progress more than one position in the line and, having either been set-up at, immediately below, and even above, a particular vacancy are qualified to perform the skills required of a position more than one place above them in the line of progression. The effect of permitting competition only among permanent assignees to the immediately subordinate job, then, is to effectively eliminate competition for permanent vacancies; whereas, if a qualified temporary present or former assignee may compete for permanent vacancies up the line, some degree of job skipping is the result, and the pre-existing seniority pattern is not locked in.

Jackson Memorandum expanded the parameters of the affected class; advanced the maximum red circle wage maintenance rates from $3.00 to $3.86 per hour; permitted permanent promotion eligibility to rest upon fulfillment of residency requirements in prerequisite jobs without regard to the permanent or temporary nature of assignment thereto; and permitted affected class competition on the basis of mill seniority against incumbents with recall rights for entry level positions in lines of progression. The memorandum again called for local negotiations on advanced level entry and job skipping.[35]

The district court found that, with respect to production jobs, since much discrimination had been eliminated, further injunctive relief from the allegedly discriminatory seniority, promotion, and transfer policies governing those jobs was inappropriate. The legal issue on appeal, then, is whether I.P.'s allegedly neutral policies, as modified by the Jackson Memoranda, effectively dispel the present effects of admitted past discrimination or, if not, whether they are necessary to a compelling business necessity.[36] *See* p. 10-12, *ante*.

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[35] The record does not disclose whether those negotiations took place. Under the 1968 Jackson Memorandum, however, I.P. took the position that the implementation of wage retention and mill seniority competition practices upon transfer obviated the need for job skipping and advanced level entry. *But see* n. 34, *supra*. At oral argument, it appeared as though a similar position had been advanced by I.P. after the 1972 memorandum.

[36] Our inquiry does not end with the implementation of the Jackson Memoranda, although they have been approved by the OFCC as sufficient for compliance with the nondiscrimination standards of the Executive Order program. "[F]inal responsibility for enforcement of Title VII is vested with federal courts." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). *See also Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 219, 221 n. 21 (5th Cir. 1974); *Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721, 724 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980, 985 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Nor does I.P.'s reliance on the provisions of the memoranda, if they prove short of adequate remedy under Title VII, excuse I.P. from compliance with Title VII. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups . . ." *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 432.

Under Title VII, seniority and promotion policies have been frequently scrutinized by courts, despite an exemption for "*bona fide* seniority or merit system[s]," 42 U.S.C. § 2000e-2(h), for they can be subtle forms of discrimination which perpetuate discriminatory patterns of the past. *See, e.g., Pettway* v. *American Cast Iron Pipe Co., supra*, 494 F.2d at 224; *Johnson* v. *Goodyear Tire & Rubber Co., supra*, 491 F.2d at 1373, n. 27 (and cases therein cited); *United States* v. *St. Louis-San Francisco Ry., supra*, 464 F.2d at 307. The approach most often followed in ameliorating the built-in discrimination peculiar to dual seniority plans, the most common form of seniority discrimination, is the "rightful place" doctrine.[37] *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441, 451 (5th Cir. 1973); *United States* v. *St. Louis-San Francisco Ry., supra*, 464 F.2d at 309; *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 661 (2d Cir. 1971). Various remedies in effectuating the right-

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[37] The "rightful place" approach holds that continued maintenance of the relative competitive disadvantage imposed on minorities by the past operation of a discriminatory system violates Title VII. Thus it permits minority members to compete for promotion on the basis of total company service. Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 Harv. L. Rev. 1260, 1268-75 (1967). *See also* Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1155-64 (1971); Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1626-29 (1969).

ful place doctrine have been adopted. Among them are mergers of segregated unions,[38] advanced level transfers,[39] job skipping,[40] and wage maintenance.[41] To some degree these policies are reflected in the Jackson Memoranda. However, those compliance pronouncements are deficient in several respects.

The $3.00 per hr. ceiling on wage rate protection under the 1968 Jackson Memorandum discouraged several affected class members who already had permanent wage rates in excess of that figure. The increased red circle ceiling in the 1972 memorandum, it has been represented, reflects merely overall increases in wage rates since 1968 but does not bring within its protections those previously excluded. Additionally, temporary assignments to jobs higher up a line of progression with comparably higher rates of pay are a frequent fact of employment at Pine Bluff. Thus an employee's permanent wage rate does not necessarily represent his average hourly net rate of pay over a period of time. Finally, the red circle computation

[38] *Rock* v. *Norfolk and Western Ry.*, 473 F.2d 1344, 1348 (4th Cir.), *cert. denied*, 412 U.S. 933 (1973); *United States* v. *St. Louis-San Francisco Ry., supra*, 464 F.2d at 310-11.

[39] *United States* v. *Hayes International Corp.*, 456 F.2d 112, 119 (5th Cir. 1972); *Long* v. *Georgia Kraft Co.*, 450 F.2d 557, 561 (5th Cir. 1971); *United States* v. *Local 189, United Papermakers & Paperworkers*, 301 F.Supp. 906, 917-18 (E.D. La.), *aff'd*, 416 F.2d 980, 990 (5th Cir. 1969); *Bush* v. *Lone Star Steel*, 7 FEP Cases 1258, 1270 (E.D. Tex. 1974).

[40] *Id.*

[41] *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 660-61 (2d Cir. 1971) citing *Robinson* v. *Lorillard Corp.*, 319 F.Supp. 835, 839, 843 (M.D. N.C. 1970); *Bush* v. *Lone Star Steel, supra*, 7 FEP Cases at 1270; *Hicks* v. *Crown Zellerbach Corp.*, 321 F.Supp. 1241, 1243-44 (E.D. La. 1969); *United States* v. *Local 189, United Papermakers & Paperworkers, supra*, 301 F.Supp. at 918, 923.

does not permit cost-of-living and contract renegotiation wage increase adjustments. *See generally* n. 41, *ante*.

The necessity to serve in every job in a line of progression is still an announced policy of I.P. As proffered at oral argument, an employee must still meet a residency requirement on the job for which he is bidding as well as that of the job immediately below. The cumulative effect of this policy is to nearly eliminate the possibility of job skipping or advanced level entry transfer opportunities. These seemingly neutral requirements that an employee serve in every job in a line of progression have impeded, in the past, affected class members' progress toward their rightful place. They may be retained, therefore, only upon a showing of business necessity. *United States* v. *N.L. Industries, supra*, 479 F.2d at 364-66; *United States* v. *St. Louis-San Francisco Ry., supra*, 464 F.2d at 308-09. I.P., however, did not present evidence that each job was an essential prerequisite to the next higher job in every line of progression. Some general evidence only was presented about general structures of lines of progression and their business convenience. But that evidence was not specific enough to meet the test of business necessity. Additionally, neither is there any assessment of the legitimacy of the length of each individual residency period[42] or consideration of whether functionally equivalent experience in another line of progression may be substituted for the residency period. *See United States* v. *Jacksonville Terminal Co., supra*, 451 F.2d at 453-54. Ab-

[42] At oral argument, I.P. represented that the average residency requirement for higher level jobs was two months and less than that for lower level jobs. It is true that this policy was adopted after the trial in the court below. However, the district court relied on this modification in denying future injunctive relief.

sent a showing of business necessity for, and justification of, the residency requirements and their respective lengths. advanced level entry and job skipping may be appropriate remedies. *See* n. 39 and n. 40, *ante*.

Finally, even assuming the trial court should determine that each job is essential to progression, I.P. has in the past, though in part in reliance on OFCC, retarded affected class promotion by its administration of the announced policies. After the McCreedy Letter, competition for permanent vacancies was limited to only those permanently assigned to the position immediately subordinate to the vacancy. This policy effectively eliminated competition for permanent vacancies, and was totally ineffectual in rendering whole the former discriminatees. The 1972 memorandum permits promotion eligibility to rest upon fulfillment of residency requirements without regard to permanent assignments to jobs. However, to bid on a vacancy, an employee must have fulfilled both the residency period for the job immediately subordinate to the vacancy, as well as the period for the vacancy itself. The latter requirement, while properly left to the district court for determination, should be very closely scrutinized. Another factor that will retard affected class movement and is a result of I.P.'s administration of the 1972 Jackson Memorandum is its present practice of further restricting competition for those vacancies to those either permanently assigned, or *then* temporarily assigned, to an immediately subordinate job. Employees may have satisfied a legitimate residency period in the recent past and thus be qualified for promotion though not be temporarily assigned to the preceding job when the permanent vacancy occurs in the line.

For these reasons we conclude that the present transfer, promotion, and seniority practices in the production department at Pine Bluff continue to perpetuate the effects of past discrimination. No significant movement to rightful places has been realized by former discriminatees, although some movement has been accomplished.[43] Thus some relief is warranted, and the district court was in error in denying such relief. We applaud, however, the district court's management of these complex issues as well as I.P.'s attempt to advance its discriminatees into and up other lines of progression in the production departments. We recognize that although I.P. was initially culpable, it was not individually so. The respective, then-segregated, unions must share liability for the discriminatory past conduct. Indeed, even since 1968, affected class movement has been partially frustrated by positions adopted by the unions, although at least UPIU has recently expressed a willingness to effectuate whatever remedies the court should impose.[44]

On remand the court should insure full wage protection to affected class members who exercise transfer opportunities by: extending red circle ceilings to average hourly rates, inclusive of temporary set-ups, over a reasonable

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[43] Judged in light of the rightful place doctrine I.P. adopts with respect to returning military employees, affected class promotion is anything but salutory. Under the former policy, a returning military incumbent employee is entitled to any promotion which he would have received had he been there as determined by his place on the seniority list. He would, however, return to the job he left, but he would then move up through the intermediate jobs *as fast as he could be trained* without regard to intermediate vacancies.

[44] In the second week of trial, United Paperworkers International Union, Locals 731, 735, 833 and 898, stipulated with plaintiffs as to its discriminatory past and willingness to seek affirmative redress for discriminatees and thereafter took a nonadverse position as party defendant. International Brotherhood of Electrical Workers, Local 2033, however, remained an active party defendant.

period of time immediately preceding the transfer, or to permanent wage rates of the employee, whichever is higher, including therein a factor for future adjustments for cost-of-living or contract negotiations wage increases and by extending coverage to every member of the affected class. Such provisions should be accompanied with an order for full publication, dissemination, and explanation of the terms of the court's decree. Additionally, red circle protections should extend to affected class members who transfer to maintenance craft positions. The district court should require that I.P. demonstrate which jobs provide essential training for progression and are supported by business necessity and which jobs, if any, could be skipped upon entry and promotion. The court should also review the lengths of the residency requirements to determine whether they are the least restrictive means to accomplish their purpose and consider whether functionally equivalent experience in former lines of progression may satisfy those requirements. Finally, the court should review I.P.'s administration of its policy of advancement of affected class members to their rightful place in light of I.P.'s military rightful place policy, with a view toward rendering whole these former discriminatees as expeditiously as possible and to the same extent that it now accords a rightful place to returning service men. Provisions of this relief should be made available to all affected class members regardless of whether they have declined transfer offers in the past. If these conditions are fully implemented, the need for a back pay award will be obviated.

V. Attorneys Fees.

The district court here awarded plaintiffs attorneys fees in the amount of $15,000 for their presentation of this Title

VII case. The award of attorneys fees under these circumstances is a matter committed to the discretion of the district court. This matter is remanded, however, with directions that the district court allocate the assessment of the attorneys fees among the three defendants weighing culpability, size, and ability to pay. This remand is also without prejudice to whatever further award of attorneys fees the district court determines to be in the interest of justice as a result of further proceedings.

We award the plaintiffs $3,000 attorneys fees on this appeal and assess them as follows: $2,000 to be paid by I.P., and $500 each by the two union defendants.

For the reasons hereinbefore expressed, the order of the district court is reversed in part, vacated in part and remanded for further proceedings consistent with the views expressed herein.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Order Modifying Opinion and Denying Respondent International Paper Company's Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 74-1086, 74-1087
74-1101, 74-1115

HENRY LEE ROGERS, *et al.*,

Appellants-Cross-Appellees,

v.

INTERNATIONAL PAPER COMPANY, *et al.*,

Appellees-Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Arkansas.

Filed: February 14, 1975.

Before:

HEANEY, BRIGHT and ROSS,

Circuit Judges.

ORDER

Upon consideration of the Petition for Rehearing filed by International Paper Company (IPC), the Court has determined that certain minor modifications should be made in its opinion.

Order Modifying Opinion and Denying Respondent International Paper Company's Petition for Rehearing

IPC claims that portions of the Court's opinion incorrectly state the facts because of a misinterpretation of remarks of counsel for IPC at oral argument. The portions of the opinion claimed to be in error are as follows:

> 1. p. 29. The necessity to serve in every job in a line of progression is still an announced policy of I.P. As proffered at oral argument, an employee must still meet a residency requirement on the job for which he is bidding as well as that of the job immediately below. The cumulative effect of this policy is to nearly eliminate the possibility of job skipping or advanced level entry transfer opportunities.
>
> 2. pp. 30-31. However, to bid on a vacancy, an employee must have fulfilled both the residency period for the job immediately subordinate to the vacancy, as well as the period for the vacancy itself. The latter requirement, while properly left to the district court for determination, should be very closely scrutinized.
>
> 3. p. 31. Another factor that will retard affected class movement and is a result of I.P.'s administration of the 1972 Jackson Memorandum is its present practice of further restricting competition for those vacancies to those either permanently assigned, or *then* temporarily assigned, to an immediately subordinate job.

After a careful review of the transcript of oral argument the Court has concluded that the suggestions are well taken and that the opinion should be and is hereby modified by inserting the following material in place of the material

Order Modifying Opinion and Denying Respondent International Paper Company's Petition for Rehearing

set forth in paragraphs 1 and 2, and deleting all of the material in paragraph 3.

1. p. 29. The necessity to serve in every job in a line of progression, (with a few exceptions), is still an announced policy of I.P. As proffered at oral argument, in most cases an employee must still meet a residency requirement on the job immediately below the job for which he is bidding. The cumulative effect of this policy is to severely restrict the possibility of job skipping or advanced level entry transfer opportunities.

2. pp. 30-31. However, to bid on a vacancy, an employee must have fulfilled the residency period for the job immediately subordinate to the vacancy. This requirement, while properly left to the district court for determination, should be very closely scrutinized.

In addition, the final sentence of footnote 35 is deleted.

The petition for rehearing is denied.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Order Denying Petitioner's Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 74-1086, 74-1087
74-1101, 74-1115

September Term, 1974

HENRY LEE ROGERS, *et al.*,

Appellants-Appellees,

v.

INTERNATIONAL PAPER COMPANY, *et al.*,

Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Arkansas.

The Court having considered petition for rehearing en banc filed by counsel for appellants-appellees, Henry Lee Rogers, et al., and being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 18, 1975

Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1446

HENRY LEE ROGERS, LEE CHESTER SMITH, and N. A. THOMPSON,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, and its LOCAL 2033; UNITED PAPERWORKERS INTERNATIONAL UNION AFL-CIO, and its LOCALS 731, 735, 833 and 898,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, AND ITS LOCAL 2033 IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF FOR RESPONDENTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, AND ITS LOCAL 2033 IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

The Decision of the Courts Below, In Denying Back Pay, Is Consistent With This Court's Decision in Albemarle Paper Company v. Moody, and Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO v. Moody, —— U.S. ——, 43 U.S.L.W. 4880, Decided June 25, 1975.

We submit that the facts of the instant case, insofar as they bear on the equitable denial of back pay, are distinguishable from those in *Albemarle Paper Co.* v.

Moody and *Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO* v. *Moody*, —— U.S. ——, 43 U.S.L.W. 4880, 10 FEP Cases 1181, decided June 25, 1975. We also submit that the denial of back pay in the instant case is consistent with the principles enunciated by this Court in those cases.

Whereas in *Albemarle,* petitioners relied, in part [1], on "the lack of 'evidence of bad faith non-compliance with the Act'" (43 U.S.L.W. at 4883), much more factually is involved here. As the Court of Appeals stated in the instant case (Pet., p. 57a-60a):

> "In 1968, the Office of Federal Contract Compliance, in the execution of the Executive Order program, advised I.P. [International Paper Co.] that they had failed to comply with the nondiscrimination requirements of the Executive Order and that, in order to retain government contract privileges, they would have to change employment practices. A conference with representatives of the Southern Kraft Division of I.P. was thereupon called by OFCC in Jackson, Mississippi, to discuss necessary modifications for Executive Order compliance. A Memorandum of Understanding, negotiated at that meeting and endorsed by the affected unions and representative mills, *was approved by the OFCC as sufficient for compliance with the Executive Order.* That memorandum, dealing only with production jobs, created remedial transfer, promotion and recall opportunities for members of an 'affected class,' defined as all black incumbent employees hired before September 1, 1962, and those additional blacks hired into black jobs after

[1] We put to one side petitioners' second defense in *Albemarle* that " 'the defendants would be substantially prejudiced' by an award of backpay that was demanded contrary to an earlier representation and late in the progress of the litigation." 43 U.S.L.W. at 4883.

> 1962. The memorandum provided that members of the affected class could compete against other applicants for entry level positions in any other line of progression on the basis of mill seniority, so long as an affected class member's qualifications were as high as the minimally qualified employee currently working in the line. Affected class members who transferred under these provisions were offered wage maintenance protection so as not to deter the exercise of the transfer rights to lower paying entry level jobs in other lines of progression. The memorandum also established that promotion, demotion, layoff, and recall rights of affected class members would be governed by mill seniority whenever a class member was in competition with a nonclass member. Finally the memorandum provided that negotiations were to take place at the mill level, between local management and local unions, regarding possible merger or shortening of lines of progression, job skipping, and advanced level entry.
>
> "*In May, 1969, upon I.P.'s request, OFCC issued a clarification of the Jackson Memorandum's provisions relating to promotion and recall. . . .*
>
> "*After the trial of this matter below, a revision of the Jackson Memorandum was tentatively adopted.* The 1972 Jackson Memorandum expanded the parameters of the affected class; advanced the maximum red circle wage maintenance rates from $3.00 to $3.86 per hour; permitted permanent promotion eligibility to rest upon fulfillment of residency requirements in prerequisite jobs without regard to the permanent or temporary nature of assignment thereto; and permitted affected class competition on the basis of mill seniority against incumbents with recall rights for entry level positions in lines of progression. The memorandum again called for local negotiations on advanced level entry and job skipping." (Footnotes omitted; emphasis added.)

It was against this background, set out at length in the opinions of both lower courts [2] in the instant case, and argued below by the Company, the IBEW and its Local 2033 as a basis for denying backpay,[3] that the Court of Appeals addressed itself to the back pay issue.[4] And while the Court of Appeals ruled that

[2] For the district court's discussion of these facts, see Pet. pp. 11a-14a, 17a-18a. "The OFCC adopted the position that the Jackson Memorandum was sufficient for compliance with Executive Order 11246 [footnote omitted] without the need for further collective bargaining beyond the agreed changes included in the Memorandum." (Pet. pp. 12a-13a).

[3] Thus, the Company's brief in the Court of Appeals stated:

> "Moreover, IP submits that its actions in reliance on *'authoritative administrative determinations', specifically addressed to its obligations under the law* [footnote omitted] make monetary liability against it inappropriate, even if those administrative determinations were now to be regarded as inadequate or erroneous." (Emphasis in the original.) Brief for International Paper Co., pp. 45-46.

And the brief for Local 2033 (pp. 6-7) stated:

> "Also we believe it a fair observation, or conclusion, to note that beginning in 1962 with the Executive Order of President Kennedy, the parties to this litigation clearly began to look to the federal government for guidance in this area of concern. This, perhaps, is always the result when the government enters the field. In any event, the record here is abundantly clear that beginning in 1962, and continuing through the trial of this case, all of these parties have relied upon the guidance of the federal government in this area of concern, and all of them have done whatever the federal government directed, from time to time, to try and comply with what was thought by all parties to be reasonable standards of resolution. As time passed, these standards were constantly revised and up-graded, and perhaps this will continue to be the policy of the federal government and those parties (including plaintiffs) who lean on it for guidance and solutions."

[4] Petitioners' characterization (Pet., p. 10) of the Court of Appeals' holding on back pay is therefore, made out of context and misplaced. Rather, the correct interpretation of the holding is that which takes into consideration the preceding passage of the opinion, quoted from above.

"those compliance pronouncements ["in the Jackson Memoranda"] are deficient in several respects," and, accordingly, directed the District Court to issue certain injunctive relief for the purpose of "effectuating the rightful place doctrine" (Pet., pp. 61a-62a), it declined to disturb the District Court's equitable denial of back pay.

Thus, there is presented by the instant case a situation in which respondents were acting in accordance with, indeed in reliance on, requirements imposed by the Office of Federal Contract Compliance for the enforcement of equal employment opportunity. Moreover, such requirements were not merely those expressed in administrative regulations of general applicability, but were developed and approved by OFCC thereunder for use by these particular parties to remedy the very employment practices which were involved in the instant case.[5]

While it is true, as the Court of Appeals itself observed (Pet., pp. 60a-61a n. 36), that compliance with the non-discrimination standards of the Executive Order program does not excuse compliance with Title VII, we would submit that compliance with the former under the close and continuing supervision of the federal agency having jurisdiction, is the kind of

[5] The situation may be compared to one where a party is acting pursuant to, and in compliance with, an injunctive order of a federal district court under Title VII only to have another arm of the federal government, such as the EEOC, prevail in obtaining the issuance by the court of further injunctive relief. Would it be error for the district court, in its equitable discretion, to deny back pay resulting from economic losses incurred during the period when the lesser relief was operative and being relied upon by the defendant as representing adequate compliance?

reason justifying a denial of back pay which "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injury suffered through past discrimination." 43 U.S.L.W. at 4885. And, it is the kind of reason which is both limited in its applicability to the "facts and circumstances peculiar to particular cases" and, at the same time, susceptible to "a consistent and principled application of the back pay provision." 43 U.S.L.W. at 4885.

Moreover, it is the kind of reason which this Court appears to have recognized as being permissibly within the scope of district courts' equitable discretion. Thus, in footnotes 17 and 18 of this Court's Opinion in *Albemarle* (43 U.S.L.W. at 4885-86), the Court referred to the very narrow immunity from liability *expressly* provided in Section 713(b) of the Act, and, in addition, the Court recognized the distinction between the "good faith" defense which it rejected in *Albemarle* and a defense based on reliance on state "female protective" statutes which are inconsistent with Title VII. The defense involved in the instant case, we would submit, fits within the intent of Section 713(b) and presents an even stronger basis for permissible trial court discretion than the "state protective law" defense.

Like the "state protective law" defense, what is involved here is reliance on the dictates of another governmental body. Here, however, we deal not with a conflict between federal and state law where, clearly, the former supersedes the latter, but rather with parallel obligations imposed within the federal government itself. And while Section 713(b) speaks in terms of reliance on the interpretation or opinion of the Equal Employment Opportunity Commission—the agency

responsible for enforcing compliance with Title VII—the same statute (Section 715) (42 U.S.C. § 2000e-14) also recognizes the need for a unified federal administrative interpretation of Title VII. To promote this purpose, Section 715 established an Equal Employment Opportunity Coordinating Council composed, *inter alia,* of the Secretary of Labor (under whose jurisdiction OFCC operates), and the Chairman of the EEOC. Section 715 goes on to provide that

> "The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and *eliminate conflict, competition, duplication and inconsistency* among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies." (Emphasis added.)

Thus, it would appear to be wholly consistent with the purposes of Title VII to allow district courts, in their equitable discretion, to deny back pay attributable to practices engaged in with the specific approval of the OFCC in its implementation of the Executive Order program for the enforcement of equal employment opportunity.

CONCLUSION

For the foregoing reasons, it is clear that the Court of Appeals' decision on the back pay issue was correct under the principles enunciated by this Court in *Albemarle Paper Co.* v. *Moody* and *Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO* v. *Moody, supra.* Its judgment denying back pay,

therefore, should not be disturbed, and the Petition for the Writ should be denied.

Alternatively, if the Court believes that the lower courts should reconsider their judgments, and the distinguishing facts of the instant case, in the light of *Albemarle,* the Court should direct the Court of Appeals to remand to the district court for reconsideration in light of *Albemarle.*

Respectfully submitted,

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1446

HENRY LEE ROGERS, LEE CHESTER SMITH, and N. A. THOMPSON,
Petitioners,

v.

INTERNATIONAL PAPER COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, AND ITS LOCAL 2033; UNITED PAPERWORKERS INTERNATIONAL UNION AFL-CIO, AND ITS LOCALS 731, 735, 833 and 898,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT INTERNATIONAL PAPER COMPANY IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

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HENRY LEE ROGERS, LEE CHESTER SMITH,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT INTERNATIONAL PAPER COMPANY IN OPPOSITION

STATEMENT OF THE CASE

Petitioners commenced this action in 1970 as a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.;* 42 U.S.C. § 1981; and 29 U.S.C. § 151 *et seq.* The complaint charged racial discrimination by respondents International Paper Company, Pine Bluff, Arkansas (the company) and the

unions representing employees at the company's paper mill at Pine Bluff, Arkansas.

In 1968, the Office of Federal Contract Compliance (OFCC) sought to provide additional opportunities for advancement of black employees in the Southern Kraft Division of International Paper company, which includes the Pine Bluff mill, in light of the initial district court opinion in *U.S.* v. *Local 189,* 282 F. Supp. 39 (E.D. La. 1968). Under the direction and with the written approval of the OFCC, the company and the unions representing Southern Kraft employees entered into a memorandum of understanding (the Jackson Memorandum) which modified their labor agreement. The Jackson Memorandum, which became effective approximately 18 months *before* the filing of the charges on which this action is based, inter alia, designated an affected class of black employees and afforded them the opportunity to make interdepartmental transfers and to compete with non-affected class employees for job vacancies on the basis of mill seniority.

The Jackson Memorandum was later revised in July, 1972, again under the direction and with the written approval of the OFCC, to deal with certain refinements such as job skipping, residency periods, eligibility for promotion based on temporary assignments and eligibility for promotion and transfer in recall situations. Since 1968 all plant promotions and other employment practices have been conducted in accordance with the Jackson Memorandum and these revisions.

The District Court Opinion. The district court found that the Jackson Memorandum of 1968 spelled the cessation of any overt racial discrimination at the Pine Bluff mill and that as of that time members of the affected class were given the opportunity to seek

their rightful place by competing for vacancies on the basis of qualifications and mill seniority. The court also determined that after 1968 no qualified senior affected class employee failed to receive a job he sought. In addition, the district court found that: (1) the company minority hiring record over the past four years was "impressive and salutary;" (2) the hiring policies of the company are not discriminatory; and (3) the testing program was not shown to have a racially disparate impact and was highly correlated with successful job performance.

Accordingly, the district court declined to grant injunctive relief in favor of petitioners but retained jurisdiction and ordered the company to make periodic reports of its hiring activities. The district court also refused to award back pay, but granted petitioners' requests for costs and attorneys fees because it felt that the lawsuit had acted as a catalyst in some respect.

The Court of Appeals Opinion. On appeal the Eighth Circuit reversed in part, vacated in part and remanded the case for development of additional facts. The only relief ordered by the court of appeals was that the age eligibility for the apprenticeship program be enlarged for affected class employees and that the practice regarding red circling of wages be revised to conform to guidelines set by the court.

The court of appeals also directed that the district court conduct further proceedings to determine (1) whether there is racial discrimination in the hiring of supervisors; (2) whether the administration of tests for maintenance craft jobs results in racial discrimination in hiring or transfers; (3) whether, and the extent

to which, job residency requirements are necessary and whether functionally equivalent experience in other jobs may satisfy these requirements; (4) whether service on certain jobs in lines of progression is necessary for advancement therein; and (5) whether the company's policy of advancing affected class members is as expeditious as its policy for advancement of employees returning from military service.

In light of the terms of its remand, the court of appeals did not order any back pay award.

ARGUMENT

I. In Its Present Posture This Case Fails To Raise an Important Question of Federal Law

The petition requests that the judgment of the court of appeals "insofar as it fails to grant back pay" be summarily vacated and remanded for further consideration in light of the Court's then anticipated decision in *Albemarle Paper Company* v. *Moody*, — U.S. —, 43 U.S.L.W. 4880 (June 25, 1975). However, such requested action by the Court would not be appropriate.

Further proceedings in the district court have been ordered by the court of appeals which remanded the case for hearings and findings on a number of issues. On remand, there is no reason to doubt that the district court will follow the instructions of the court of appeals as well as apply the extant standards of the Court, including, to the extent applicable, those enunciated in *Albemarle*.

Since the judgment of the court of appeals has not finally determined this case and because further proceedings have been ordered, vacation of the judgment

below is not required and would be an improvident exercise of the Court's certiorari jurisdiction. Summary vacation and remand would be appropriate only if the court of appeals' judgment were final and, if not vacated by this Court, would prevent the district court from considering the impact of *Albemarle*. But such is not the situation here since the district court will have an opportunity to consider the *Albemarle* decision as well as the matters designated by the court of appeals.

At this stage of the proceedings there is no important federal question raised[1] and the granting of a writ of certiorari would only interrupt unnecessarily the normal judicial process. Petitioners erroneously argue that efficient judicial administration would be

[1] Petitioners' claim conflicts with decisions of the Third, Fourth, Fifth, Sixth and Seventh Circuits. This claim is based upon the incorrect assumption that the Eighth Circuit held that comprehensive injunctive relief would obviate the necessity of back pay. However, in this case no comprehensive injunctive relief has been granted. Rather, with the exception of two relatively minor directions as to age levels for apprenticeship entry and red circling of wages, the court of appeals simply remanded for further consideration of the facts.

In the cases which petitioners argue are in conflict, comprehensive injunctive relief and back pay awards were made only after findings of discriminatory employment practices in violation of Title VII and a showing of economic loss by class members. Those cases are inapposite to the case here where no proof of economic loss was adduced, where injunctive relief was specifically found to be unwarranted by the trial court and where the appellate court has not directed the issuance of a comprehensive injunction but instead called for further hearings on the justification for certain aspects of the company's promotion and hiring practices. Furthermore, the remand proceedings may prove that some of the changes sought by the plaintiffs would give no promise of greater affected class movement than has already occurred or could be expected under previous remedial efforts.

served by the granting of a writ in this case. Clearly the opposite would result if this case were remanded to the court of appeals since this would only delay the further hearing by the district court which is necessary to determine the facts upon which back pay relief, if any, could be based.

II. This Case Raises Issues Not Controlled by or Considered in Albemarle Paper Company v. Moody

Albemarle Paper Company v. *Moody* held, *inter alia,* that "back pay should be denied only for reasons which if applied generally, would not frustrate the central statutory purpose of eradicating discrimination through the economy and making persons whole for injuries suffered through past discrimination." *Supra* at 4885. Specifically, the Court determined that the absence of bad faith on the part of the employer was not a ground for withholding an award of back pay.

However, the Court recognized that facts and circumstances peculiar to particular cases may present reasons for denying back pay. *Supra* at 4885-6. For example, it noted that back pay is not available as relief if the employer's conduct was undertaken in good faith reliance upon an interpretation or opinion of the Equal Employment Opportunity Commission. *Supra* note 17 at 4885-6. Further, the Court explicitly did not repudiate those cases in which back pay was denied where the employer had discriminated on sexual grounds in reliance upon state female protective statutes which were inconsistent with Title VII. *Supra* note 18 at 4886.

Similarly, the court of appeals did not decide the issues presented by this case where substantial and

effective remedial measures were collectively bargained and adopted long before definitive court rulings concerning Title VII were issued; where unilateral changes in such new practices were authoritatively determined to be not required by a federal anti-discrimination law, and; where refinements in these practices were collectively bargained in response to evolving fair employment standards and experience in the movement of the affected class.[2] While these actions left the employer's seniority practices subject to judicial review and further prospective revision, they provide an equitable basis under the *Albemarle* rationale for denying back pay consistent with Congressional intent even if the district court determines on remand that subsequent revision is required.

Because this case is distinguishable from *Albemarle Paper Company* in several important respects and has already been remanded to the district court there is no basis for the Court to grant the relief sought by petitioners. If the Court is nonetheless inclined to grant certiorari, it should afford respondents the opportunity to fully develop the distinctions between this case and *Albemarle* through briefs and argument.

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[2] Both Jackson Memoranda were approved in writing by the Director of OFCC, the Federal official properly authorized to make such rulings under the Executive Order. 41 C.F.R. 60-1.2.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

Respectfully submitted,

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